Supreme Court, U.S.
FILED
MAY 16 1980
MICHAEL RODAK, JR., CLERK

No. 79-1823

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NORTHFIELD CHEESE COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the Third Circuit

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TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statutory Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	11
Conclusion	16
Appendix A (Judgment of Third Circuit Court of Appeals)	A-1
Appendix B (Decision and Order of the National Labor Relations Board)	A-4
Appendix C (Decision of Administrative Law Judge)	A-7
Appendix D (Transcript of Oral Argument before the Third Circuit Court of Appeals)	A-48

TABLE OF CASES CITED

Amalgamated Transit Union, Division 819 v. Byrne, 568 F.2d 1025 (3rd Cir. 1977)	13
American Shipbuilding Co. v. NLRB, 380 U.S. 300 (1965)	12,14
Dallas General Drivers Local Union No. 745 v. NLRB, 355 F.2d 842 (D.C. Cir. 1966)	15

Dow Chemical Co., 216 NLRB 82 (1975) 15

Gulf States Manufacturers, Inc. v. NLRB, 579 F.2d 1298 (5th Cir. 1978) 13

H. K. Porter Co. v. NLRB, 397 U.S. 99 (1970) 12,13

Midwest Casting Corp., 194 NLRB 523 (1971) 7,14,15

NLRB v. American National Insurance Co., 343 U.S. 395 (1952) 13

NLRB v. Insurance Agents International Union, 361 U.S. 477 (1960) 11,13,14,16

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 12

NLRB v. Katz, 369 U.S. 736 (1962) 12

NLRB v. N.Y.-Keansburg-Long Branch Bus Co., Inc., 578 F.2d 472 (3rd Cir. 1978) 13

NLRB v. Texas Coca-Cola Bottling Co., 365 F.2d 321 (5th Cir. 1966) 15

NLRB v. United Nuclear Corp. 381 F.2d 972 (10th Cir. 1967) 15

Northfield Cheese Co., 242 NLRB No. 157 1

STATUTES CITED

28 U.S.C. §1254(1) 2

29 U.S.C. §158(a)(5)(d) 2,3,11,12,13,15

No.

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VS.

NATIONAL LABOR RELATIONS BOARD,
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PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the Third Circuit

The Petitioner, Northfield Cheese Company, respectfully prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Third Circuit rendered March 21, 1980.

OPINION BELOW

The Court of Appeals rendered a judgment without opinion, affirming and enforcing an Order of the National Labor Relations Board. The Order of the National Labor Relations Board was issued on June 13, 1979 and is reported at 242 NLRB No. 157. This Order affirmed the opinion of the Administrative Law Judge and appears in the Appendix submitted as part of this Petition.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on March 21, 1980, enforcing an Order of the National Labor Relations Board dated June 13, 1979. On April 16, 1980 the Court of Appeals for the Third Circuit denied Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc. This Petition for Certiorari was filed within ninety (90) days of entry of the judgment by the Court of Appeals for the Third Circuit. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether a violation of Section 8(a)(5) of the National Labor Relations Act may be sustained under the theory that the Company's admittedly hard bargaining became illegal bargaining, absent any evidence of technical violations of Section 8(a)(5) and in view of Supreme Court precedent that there is no inconsistency between the use of economic pressure and good faith collective bargaining.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

§158(a)(5)

> It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees . . .

§158(d)

> For the purposes of this Section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employ-

ment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession .

STATEMENT OF THE CASE

I. Nature of the Case and Proceedings Below

This consolidated unfair labor practice case was tried on April 19-21 and 26-28, 1978. In his decision the Administrative Law Judge[1] found, *inter alia,* that the Company violated Section 8(a)(5) of the Act by engaging in bad faith bargaining with no intention of reaching an agreement with the Union from May 6, 1977, until the end of the strike which began on May 3, 1977, and by thereafter continuing to bargain in bad faith concerning union security.

The ALJ recommended to the Board that the Company be ordered to cease and desist from unlawfully refusing to bargain with the Union as the exclusive representative of the Company's production and maintenance employees. Thereafter, the Company filed timely exceptions to the ALJ's decision contending that he had made findings of fact and conclusions of law unsupported by record evidence and contrary to applicable Board and Court precedent.

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[1] For convenience, the Administrative Law Judge is hereinafter referred to as the "ALJ"; Petitioner is hereinafter referred to as the "Company"; Respondent National Labor Relations Board is hereinafter referred to as the "Board"; and the Meat, Food and Allied Workers, Local P-653, Amalgamated Meatcutters and Butcher Workmen of North America, AFL-CIO, (Charging Party in the proceedings before the Board) is hereinafter referred to as the "Union". References to the "Act" are to the National Labor Relations Act, as amended, 29 U.S.C. §141, *et seq.*

On June 13, 1979, the Board issued its Decision and Order adopting the ALJ's rulings, finding and conclusions and adopting his recommended Order with some modification (A. pp. A-4—A-6).

Pursuant to Section 10(f) of the Act, 29 U.S.C. §160, the Company petitioned for review of the Board's Order in the Third Circuit Court of Appeals. The Board filed a cross-application for enforcement of its Order and enforcement was granted by the Court of Appeals in its judgment entered March 21, 1980. On April 16, 1980, the Court of Appeals denied the Company's Petition for Rehearing. Subsequently, on April 23, 1980, the Company moved to stay issuance of the mandate pending application to the United States Supreme Court for a writ of certiorari. On April 28, 1980, the Court stayed issuance of the certified judgment in lieu of formal mandate until May 16, 1980.

II. Statement of the Facts

The Company is engaged in the manufacture and processing of cheese products at its Northvale, New Jersey facility. As a necessary part of its business the Company imports raw materials for the processing of cheese under various licenses granted by the Government. At the time of the incidents which form the basis of the charges alleged herein, the Company and the Union had enjoyed a 20-year bargaining history without any strikes. The Union represented approximately 39 employees in a bargaining unit of all production and maintenance employees.

A. Pre-Strike Negotiations

The last labor contract between the parties expired on April 30, 1977. In characteristic fashion the parties did not commence negotiations on a new contract until late in the Section 8(d) period following a grievance conference on April 20, 1977.

Prior to the April 20 negotiating session, the Union sent to the Company a set of written proposals. As early as the April 20 meeting, Company President Mark Robbins made a statement concerning the Company's financial condition. As the Union

reviewed its proposals, Robbins asked what the wage proposal was and was told that the Union would present a proposal at the next meeting. Among the items discussed at the first meeting on April 20 were: separation pay; pension payments; elimination of labor grades and establishment of a job classification to replace labor grades; increased cost-of-living; institution of a welfare program; dental, drugs and optical; hospitalization; revision of plant rules; vacation schedules; leaves of absence; and in-plant eating areas and facilities.

The next bargaining session occurred on April 22, 1977. President Robbins negotiated on behalf of the Company; Business Agent Mitchell Holloway negotiated on behalf of the Union. Robbins began by explaining at some length the economic problems which the Company was experiencing. He submitted to the Union a report from the Company's accounting department which was an excerpt from the Company's financial statement. Robbins explained that he had never done this before in the past, but in view of the circumstances he felt the situation warranted such disclosure. The figures showed a substantial decline in income in the months of February and March of 1977, and Robbins testified that the figure for January was not as good as it looked since it actually reflected two months' profit. The Union committee studied the report and there was no further communication from the Union concerning it.[2]

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[2]Union Negotiator Holloway testified that he did not dispute the Company's claim of inability to pay. Although he testified that the Union had no way to intelligently discuss the Company's finances because the Union knew nothing about the Company's operation, Holloway admitted on cross-examination that he took special training classes on the subject of collective bargaining and was aware of the fact that he could have requested an audit through a Federal mediator. He subsequently acknowledged that he could have had an audit at any time after April 22, 1977, but that he did not and, as late as the hearing in this case, had not requested an audit.

Robbins also submitted the Company's proposals which responded to the Union's proposals previously submitted. At the close of the April 22 meeting, agreement was reached on some items; others remained in dispute.

The parties next met on April 28, 1977. Robbins began by submitting a revised Company proposal with an attached analysis of the proposed wage increase. The parties continued to discuss the items that remained in dispute.

By the end of the April 28 bargaining session, the Company had increased its total wage proposal $.15 an hour from $.30 to $.45, and the Union had decreased its total wage proposal $.54 an hour from $1.70 to $1.16. Over the proposed three year period the gap was thus reduced from $1.40 to $.71. The Union, however, advised Robbins that the parties were very far apart on wages, and suggested that the Federal Mediation and Conciliation Service (FMCS) be brought in.

Monday, May 2, 1977 was the first workday after the expiration of the contract. Work was performed on that day although there was, in the words of Company Production Manager Jerry Ross, an atmosphere of tension at the plant.

Despite the ALJ's finding that a strike began on May 3, 1977, there was considerable evidence to show that a concerted slowdown in production occurred on May 2. On the morning of May 3, however, all of the production and maintenance employees left the Company premises and went on strike.

B. Negotiations During the Strike

The next bargaining session was conducted on May 6 at the FMCS offices. Prior to the session, Robbins and Company Attorney Joseph Carey met to plan their bargaining tactics. Because the parties were far apart on wages and the Company was operating in a severe financial condition, the men discussed different approaches to the bargaining. Robbins felt that something serious had to be done to stabilize the situation and

to reach a settlement. Robbins wanted to make it clear that the Company was not going to agree to anything near the Union's wage demands and, further, he wanted to make it clear that eventual settlement would require a substantial decrease in those wage demands.

During their meeting Carey and Robbins discussed a bargaining tactic which would provide some method that would really "shake up the troops". Carey showed Robbins a copy of the Board's decision in *Midwest Casting Corp.*, 194 NLRB 523 (1971), and the latter testified that the two men went over the Board decision almost line by line. Robbins further testified that "in looking at the *Midwest Casting* case from the viewpoint of a potential strategy for bargaining tactics, I was quite surprised that the conditions, the circumstances and most of the events that took place in the *Midwest Casting* case were almost identical to the Northfield Cheese circumstance." Although Robbins thought that the strategy used in *Midwest Casting* was a severe one, he felt reassured by the Board's decision in that case. In fact, he wrote a note to himself to be sure that he would present this tactic at the next bargaining session in a manner which would coincide with Carey's advice.

At the May 6 bargaining session during which Carey participated for the first time, the first item on Robbins' prepared statement was a complete withdrawal of Item 1, Wages. This item had been offered to but not accepted by the Union committee. The other two items on the list were union security and dues checkoff. In view of the withdrawal of the three items that he mentioned, Robbins proposed that the Union consider a one-year contract with the exclusion of those three items. Robbins explained that the previously-agreed-to items were not being withdrawn.

The Union was surprised by Robbins' proposal and Holloway mentioned that he thought that the parties had had a better relationship after 20 years of good bargaining. Robbins responded

that circumstances had changed somewhat, i.e. the employees were now on strike and, of course, at the time of the prior meeting they had not been on strike. He pointed out the considerable cost the Company was incurring as a result of the strike. Robbins again explained at some length the financial condition of the Company, and he tried to make the point clear that he had no business offering any wage increase in view of the fact that it constituted deficit spending. He stated that the point had to be made and understood very clearly that the Company was not about to offer more money.

On cross-examination, Robbins testified that the action of May 6 was combined in the bargaining tactic with the Company's refusal to grant retroactivity. Robbins explained that the action of May 6 was not attributable to the Union's request for retroactivity, but rather that the Union's wage proposal was the sole problem. He testified, "I felt that the proposal (Union Item 1, Wages) was unobtainable for Northfield Cheese Company in view of its financial situation, and therefore, I felt that in order for us to reach an agreement, the Union required this action that would bring them to realize how serious I was about not granting that increase, irrespective of their personal needs or our personal needs."

On cross-examination by Board Counsel, Robbins testified that when he went to the meeting on May 6 he wanted to resolve the situation so that the Company could get back to normal procedure. He testified that his proposal was designed to accomplish a settlement on terms that were more comfortable to the Company financially. Although the Union had rejected the Company's wage offer on April 28, Robbins testified that the May 6 proposal, which did not increase wages, was calculated to make the Union aware of the seriousness of the Company's position. Robbins again stressed that he told the Union (as he had told them in the two prior sessions) that the Company financially could not go as far as the Union was asking it to go.

There was no change in the parties' positions in the bargaining sessions of May 27 and June 28.

On July 18, 1977 Robbins received a mailgram from Union President Holloway stating that the Union ". . . will agree to send these workers back to work unconditionally pending further negotiations. We ask that you reinstate all these workers immediately." Robbins responded on July 19 by telegram to Holloway informing the Union that, ". . . all of the striking employees have been, in fact, permanently replaced and there are, therefore, no job openings at this time."

The next bargaining session was conducted on August 12, 1977, and the subject of reinstatement rights was discussed. As to substantive issues, there was no change in the parties' positions. Immediately following the August 12 session the Union announced the termination of its strike against the Company by mailgram received on August 15, 1977. The mailgram added that the striking employees would report to the job site on Monday, August 15, 1977, at 8:00 a.m.

C. Bargaining on Union Security

The next bargaining session occurred on September 2, 1977. Robbins announced at this session that wages would be placed back on the table (having been withdrawn earlier) at a rate of $.10 per year increase for three years. The Company also proposed a twelve-month suspension of union security and checkoff, but this period was later reduced to six months. Robbins stated that the Company proposal was that one or two people, or whatever small number remained of the permanent replacement workers following the reinstatement procedure, would be granted ongoing exclusion or exemption from compulsory membership in the Union. In addition to the wage proposal discussed on September 2, Robbins also went through the other items listed 2 through 12. The whole program was repeated and carried as an offer. The Union proposed reducing its

wage demand to a $.77 an hour increase to which the Company counterproposed an increase of $.12, $.12, and $.12 over a three-year term. The Union then lowered its wage demand to $.71 over a three-year period.

The next bargaining session was held on September 26, 1977. The Union proposed a reduction in its wage demand from $.71 to $.63 over a three-year period; however, this proposal was rejected by the Company. Robbins again discussed the Company's inability to pay and gave the Union an update on the Company's financial situation.

The update revealed that the Company was operating at a continued deficit and that the cheese market conditions upon which the Company's financial well-being was based had not really improved. The final year-end figures reflected a loss in excess of five hundred thousand dollars.

The next bargaining session was conducted before FMCS Commissioner Arthur on October 11, 1977. The Company supplied information to the Union concerning the number of employees in the bargaining unit.

Effective the first working day of January, 1978, the Company granted the first $.12 per hour increase. This was in accordance with its last offer, originally made on September 2, 1977.

In 1978, the parties met on January 16, February 9, March 8, April 3, and April 6. On December 28, the parties executed a one-year contract.

REASONS FOR GRANTING THE WRIT

The Court of Appeals Has Decided a Federal Question in a Way Which Conflicts With Applicable Decisions of the Supreme Court.

By failing to issue an opinion with its judgment of March 21, 1980, the Third Circuit Court of Appeals affirmed the Board's finding that the Company failed to bargain in good faith in violation of Section 8(a)(5) of the Act. This finding conflicts with the teachings of the Supreme Court in *NLRB* v. *Insurance Agents' International Union,* 361 U.S. 477 (1960) and its progeny. In fact, the instant case reflects the use by both parties of all of the economic weapons at their disposal. Such use constituted hard bargaining, not bad faith bargaining.

At oral argument before the Third Circuit, Counsel for the Company was asked by the Court at which point "hard bargaining" becomes "surface bargaining." (A. pp. A-53—A-54) Counsel responded that there was no point at which hard bargaining crossed the line to become surface bargaining. The Court's apparent assumption that hard bargaining may become surface bargaining is an erroneous assumption.

Fundamental to an understanding of the Company's position herein is that the tactics which it employed during the course of contract negotiations were admittedly tactics which led to a firm and adamant bargaining position. These tactics were designed not to frustrate agreement, but to reach agreement. However, regardless of how firm and adamant the Company's position was, its "hard bargaining" posture did not become "surface bargaining" since hard bargaining is legally permissible absent technical violations of Section 8(a)(5) of the Act. The Court's question to Counsel was premised on a faulty assumption, i.e., that if hard bargaining becomes too hard (for the Union), then it must be illegal. This assumption is contrary to this Court's holding in *Insurance Agents, supra,* that parties to the bargaining process are not protected from the adverse economic conse-

quences encountered. The realities of industrial life demand that the parties exert economic pressure during negotiations. The inquiry into good faith bargaining is not whether one party or the other is necessarily "fair" or "generous" with regard to what it proposed. Instead, the inquiry should be whether or not bargaining was conducted in good faith. By raising the question of when hard bargaining becomes suface bargaining, the Third Circuit misstated the issue and misdirected its inquiry. In the instant case, the Board never found the Company guilty of engaging in dilatory tactics, failure to furnish information, or other technical violations of Section 8(a)(5) often found in surface bargaining cases. Nor did the Board find the Company's unilateral wage increase of an identical offer previously rejected by the Union on January 1, 1978 to be unlawful. The inescapable conclusion is that the unilateral action was lawful because of the presence of impasse. *NLRB* v. *Katz,* 369 U.S. 736 (1962). Impasse *presupposes* good faith bargaining.

The Circuit Court's decision in summarily affirming the Board failed to consider the Supreme Court's reasoning and holdings in *American Shipbuilding, supra; Insurance Agents, supra;* and *H. K. Porter* v. *NLRB,* 397 U.S. 99 (1970). In those cases, the Supreme Court expressly recognized the right of the parties to exert economic pressure during contract negotiations, and recognized that the Act does not compel any agreement whatsoever. As long ago as 1937, this Court stated in *NLRB* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1, that the policy of the Act is to promote industrial peace and bring about adjustments and agreements which the Act itself does not attempt to compel. *Id.* at 45. By attempting to draw lines, and by assuming that hard bargaining may become surface bargaining, the Court and Board have contravened the policy of the Act.

It appears that the basis of the Court's holding that the Board did not bargain in good faith was the Court's dislike for and disapproval of the Company's proposals concerning disputed items on which the parties could not agree. Section 8(d) of the

Act provides, however, that the obligation to bargain collectively does not compel either party to agree to a proposal or require the making of a concession. 29 U.S.C. §158(d). Clearly, neither side can be forced to agree to a specific proposal of the other side, nor to make a concession with reference thereto. *Gulf States Mfg., Inc.* v. *NLRB,* 579 F.2d 1298, 1316 (5th Cir. 1978). Neither the Board nor the Third Circuit may directly or indirectly compel concessions or otherwise sit in judgment of the substantive terms of bargaining agreements or step into the negotiations and impose their own views of a desirable agreement. *H.K. Porter, supra; Insurance Agents, supra; NLRB* v. *American National Insurance Co.,* 343 U.S. 395 (1952); *NLRB* v. *New York-Keansburg-Long Branch Bus Co., Inc.,* 578 F. 2d 472 (3rd Cir. 1978); *Amalgamated Transit Union, Division 819* v. *Byrne,* 568 F. 2d 1025, 1033 (3rd Cir. 1977).

As the Court has consistently recognized, "[t]he use of economic pressure by the parties . . . is not a grudging exception to some policy of completely academic discussion enjoined by the Act; it is part and parcel of the process of collective bargaining." *Insurance Agents, supra,* at 495. While the parties' freedom of contract is not absolute under the Act, "allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract." *H.K. Porter, supra,* at 108.

The mere fact that the Company stood firm on various matters and sought a contract with terms that it considered most favorable to its own position is not illegal. The Union was also seeking a contract which it deemed favorable. To exert economic pressure upon the Company the Union struck. This was a lawful weapon designed to force the Company to yield to the Union's demands.

Instead of yielding, however, the Company maintained its firm stance.

In *American Shipbuilding, supra,* this Court, referring to the effects of certain bargaining tactics used by employers, quoted from *Insurance Agents, supra,* and said:

> "[w]hen the Board moves in this area . . . it is functioning as an arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands. It has sought to introduce some standard of properly 'balanced' bargaining power, or some new distinction of justifiable and unjustifiable, proper and 'abusive' economic weapons into . . . the Act . . . We have expressed our belief that this amounts to the Board's entrance into the substantive aspects of the bargaining process to an extent Congress has not countenanced."
>
> 380 U.S. at 317-18.

Six years after the *American Shipbuilding* case, the Board, in adopting the decision of the ALJ in *Midwest Casting Corp. supra,* made it clear that it understood the teachings of the Supreme Court in *Insurance Agents* and *American Shipbuilding* and that it intended to follow such teachings. The Board stated:

> "It is the [ALJ's] primary responsibility to evaluate whether the parties were bargaining in good faith and whether their various bargaining positions were reasonably tenable; but it is not his function to substitute his views for reasonably tenable positions of the parties. For instance, we do not undertake to say that the Union's wage demands were too high or the Company's wage offer too low; or that one position or the other was right or wrong on the length of time seniority should be retained after layoff; or that the union was right or wrong in feeling or saying at one stage that the Company was not interested in a contract but was out to break the Union; or that the Company

was right or wrong in criticizing the Union for not meeting more frequently and for longer periods. We evaluate all the foregoing types of positions in an overall context and unless they are so untenable or so contrary to good faith bargaining as to reveal a desire to frustrate agreement, we do not focus on this or that bargaining position as illegal, regardless of whether we agree or disagree with a particular position of one of the parties."

194 NLRB at 531.

Four years after *Midwest Casting,* the Board restated the law on collective bargaining in *Dow Chemical Co.,* 216 NLRB 82 1975). In that case the Board said:

"There is no question here concerning applicable principles: Section 8(d) of the Act defines the duty to bargain as the mutual obligation 'to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement.' This statutory standard contemplates 'a willingness to enter the discussion with an open mind and purpose to reach an agreement consistent with the respective rights of the parties.' *NLRB* v. *Texas Coca-Cola Bottling Co.,* 365 F.2d 321, 322-323 (5th Cir. 1966). While a party may not come to the bargaining table with a closed mind, neither is he bound to yield any position fairly maintained (*NLRB* v. *United Nuclear Corp.,* 381 F.2d 972, 979 10th Cir. 1967)); 'firmness of a bargaining position does not constitute bad faith,' *Dallas General Drivers, Local Union No. 745* v. *NLRB,* 355 F.2d 842 (D.C. Cir. 1966); and where negotiations are otherwise carried on in good faith, Section 8(a)(5) is not violated 'simply because on some of the issues, even though they may be crucial, one or the other of the parties has been unwilling to recede from his position so as to yield to the contentions or demands of the other."

216 NLRB at 85.

In the instant case, the Court and Board committed the mistake which the Supreme Court has repeatedly condemned: that of judging good faith bargaining with reference to the fairness or the unfairness of the Company's position, while at the same time, ignoring the law that the parties do not come into the arena of collective bargaining free from adverse economic consequences. As this Court noted in *Insurance Agents, supra,* there is simply no inconsistency between the application of economic pressure and good-faith bargaining. 361 U.S. at 494-95.

The conflict between the judgment of the Court below and the holdings of the Supreme Court justifies the grant of certiorari.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Third Circuit.

Respectfully submitted,

NORTHFIELD CHEESE COMPANY
By: Joseph P. Carey
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914/631-6246

By: Fred W. Elarbee, Jr.
By: David M. Vaughan
By: Bennet D. Alsher
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Petition for a Writ of Certiorari have this date been served upon the parties named below by depositing same in the United States Mail, properly addressed, with correct postage affixed.

Elliott Moore, Esquire
Deputy Associate General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, N. W.
Washington, D.C. 20570

Barbara A. Atkin
National Labor Relations Board
1717 Pennsylvania Avenue, N. W.
Washington, D.C. 20570

This 15th day of May, 1980.

Bennet D. Alsher

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-1888

NORTHFIELD CHEESE COMPANY,
Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent

Petition for Review
National Labor Relation Board

Argued
March 20, 1980
Before: ALDISERT and GIBBONS, *Circuit Judges,*
and POLLAK, *District Judge.**

JUDGMENT ORDER

After considering the contentions of the petitioner for review and of the National Labor Relations Board, it is

ADJUDGED AND ORDERED that the petition to vacate and set aside the order of the National Labor Relations Board be and the same is hereby denied and that the application by the National Labor Relations Board for enforcement of its order be and the same is hereby granted.

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* Honorable Louis H. Pollak, of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

Costs taxed against petitioner.

BY THE COURT,

R. J. Aldisert
Circuit Judge

Attest:

Thomas F. Quinn, Clerk

DATED: March 21, 1980

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-1888

NORTHFIELD CHEESE COMPANY,
Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent

Present: ALDISERT and GIBBONS, *Circuit Judges,*
and POLLAK, *District Judge.**

---

* Honorable Louis H. Pollak, of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

ORDER

Petitioner's motion that the Court dismiss respondent's cross-application for enforcement of an order of the National Labor Relations Board be and the same is hereby DENIED.

BY THE COURT,

R. J. Aldisert
Circuit Judge

DATED: March 21, 1980

APPENDIX B

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Northfield Cheese Company	
and	Case 22—CA—7675
Alfreda Williams, an Individual	
and	Cases 22—CA—7799 and
Meat, Food & Allied Workers, Local P-653 Amalgamated Meat Cutters & Butcher Workmen of North American, AFL—CIO	22—CA-7899

DECISION AND ORDER

On February 6, 1979, Administrative Law Judge Marion C. Ladwig issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and General Counsel filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Ad-

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

ministrative Law Judge and to adopt his recommended Order, as modified herein[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Northfield Cheese Company, Northvale, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 2(a):

"(a) Offer Miguel Hernandez, Emilio Ramirez, and Alfreda Williams immediate and full reinstatement to their former jobs or, if their jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, previously enjoyed and make them (until proper offer of reinstatement) whole for any loss of pay or other benefits since May 13, 1977, and make the following 29 former strikers (until the dates of proper offers shown after their names) whole for any loss of pay or other benefits since July 18, 1977, in the manner set forth in the Remedy section:

In affirming the Administrative Law Judge we do not adopt his conclusion that Respondent's bargaining stance was influenced by its "anticipating a decertification petition being filed." No such petition was ever filed and there is no evidence that one was being circulated among the employees.

[2] In conformity with *Abilities and Goodwill, Inc.*, 241 NLRB No. 5 (1979), Miguel Hernadez, Emilio Ramirez, and Alfreda Williams shall be made whole for any loss of pay or other benefits from May 13, 1978, the date of their illegal discharge. For reasons stated in her dissent in *Abilities and Goodwill, Inc.*, Member Murphy would adopt the Administrative Law Judge's recommended Order that makes these employees whole for any loss of pay or other benefits as of July 18, 1977, the date on which the Union made an unconditional offer on behalf of the strikers to return to work.

"Herbert Anderson	10/24/77	Donella Lawson	9/8/77
Joseph Bergen	11/10/77	Fabio Medina	11/2/77
Pearl Bradley	11/30/77	Elizabeth Mercedes	10/25/77
Manuel Camilo	11/10/77	Jose Rodriquez	10/5/77
Rafael Florencio	11/28/77	Pedro Rodriquez	11/2/77
Maria Garcia	9/8/77	Jose Rubio	11/28/77
Gwendolyn George	11/28/77	Hundo Sanders	9/7/77
Jose Gortorrel	9/14/77	Geneva Smith	12/22/77
Mercedes Grullar	9/8/77	Ethel Solomon	9/8/77
Simon Gruyair	11/28/77	Elizabeth Sunga	8/9/77
Socorro Guzman	9/1/77	Donald Tackaberry	9/14/77
Roosevelt Hatcher	10/5/77	Virginia Thorton	9/1/77
Alvin Holmes	12/5/77	Charles Williams	9/1/77
Sonja Holmes	1/24/78	Jose Williams	9/14/77"
Ella Jenkins	10/5/77		

Dated, Washington, D.C. June 13, 1979.

Howard Jenkins, Jr. Member

Betty Southard Murphy, Member

John C. Truesdale, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX C

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Northfield Cheese Company

and Case 22-CA-7675

Alfreda Williams, An Individual

Meat, Food & Allied Workers Local P-653, Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO — Cases 22-CA-7799 22-CA-7899

John J. Peirano and Celeste J. Mattina, Esqs., for the General Counsel.
Joseph P. Carey, Esq., of Tarrytown, NY, for the Respondent.
Jerry Gordon, Esq., of Washington, DC, for the Union.

DECISION

Statement of the Case

MARION C. LADWIG, Administrative Law Judge: These consolidated cases were tried at Newark, New Jersey, on April 19-21 and 26-28, 1978. A charge was filed by the individual, Mrs. Alfreda Williams, on May 19, 1977,[1] and charges were filed by the Union on July 15 and September 2; a complaint was issued on July 1 and consolidated complaints were issued on August 31 and September 13 (and amended at the trial).

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[1] All dates are in 1977 unless otherwise stated.

After three bargaining sessions in which there admittedly was "excellent movement" toward reaching a new agreement, the Company followed the advice of its attorney, an official of the parent company, to refuse to extend the old agreement and to take a "severe" bargaining tactic, with the knowledge that the attorney-official had been "involved on behalf of other [parent company's] subsidiaries in successful efforts to oust unions from those subsidiaries, including [this] Union." The primary issues are whether the Company, the Respondent, (a) in order to "break the Union," engaged in bad faith bargaining, (b) refused and delayed reinstatement of employees, and (c) unlawfully discharged three striking employees for assisting the Union and engaging in protected picketing activity, in violation of Section 8(a)(1), (3), and (5) of the National Labor Relations Act.

Upon the entire record,[2] including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and the Company, I make the following:

FINDINGS OF FACT

I. Jurisdiction

The Company, a New Jersey corporation, is engaged in the manufacture of cheese products at its plant in Northvale, New Jersey, where it annually receives goods valued in excess of $50,000 directly from outside the State. The Company admits,

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[2] The General Counsel's unopposed motion to correct lines 7 and 9 on page 1279 of the transcript, changing "his fists" to "his face," is granted. The Company's January 17, 1979 motion to open the hearing to receive as documentary evidence a copy of a new 1-year agreement executed on December 28, 1978, effective from October 1, 1978, through September 30, 1979, is denied; however, the document is received in evidence as R. Exh. 24.

and I find, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. **Prior Bargaining**

The Union represented about 39 employees in a bargaining unit of all production and maintenance employees. There had been a 20-year bargaining history, without any strikes, and the Company had never proposed the removal of the union-shop and checkoff provisions which had been included in all of the agreements. The last 3-year agreement expired Saturday night, April 30. Company Attorney Joseph Carey, an official of the parent company, Kane-Miller Corporation, had previously participated in negotiations with the Union.

In 1976, a year in which the Company suffered an operating deficit of about $40,000 or $50,000, the union membership first *rejected* a wage-reopener settlement reached by the Company and the union bargaining committee, but later reversed itself and *accepted* the settlement, following the Company's bargaining "tactic" of communicating its position directly to the employees. Its April 27, 1966 letter to them (U. Exh. 1) referred to the Company's "financial situation," cited "trouble getting enough cheese to operate," the high prices of cheese obtainable, and having to operate on one production line when the plant was designed for two lines. The letter stated that its 10-cents-per-hour offered increase was its "top offer," and that if the employees called a strike, the Company had the right to "carry on business in the usual manner and to hire permanent replacement employees." The letter, signed by President Mark Robbins, continued:

> I want to make it very clear to each and every employee that if a strike does take place, we will continue to operate

this business. And, if necessary, we will hire permanent replacements for every employee that goes on strike. Furthermore, I want you to know now that I will not agree as part of a strike settlement to discharge anyone who is hired as a permanent replacement.

B. Prestrike Negotiations

By the time the Company and Union began bargaining in 1977 for a new agreement, the Company had begun installing new facilities to increase production and to operate more efficiently and profitably. Only President Robbins was representing the Company in negotiations, and the evidence is clear that both the Company and the Union were negotiating in good faith during the three bargaining sessions on April 20, 22, and 28, preceding the April 30 expiration of the old agreement. By the end of the three sessions, which lasted from 1 to 2½ hours, the parties were near agreement on all issues except wages. According to President Robbins at the trial (Tr. 459-464), the parties agreed on Item 2 (separation pay) of the Union's April 20 contract proposals; the Union had dropped its request in Item 3 (increased pension); the Union accepted the Company's proposal on Item 4 (substituting job classifications for labor grades); the parties agreed on Item 5 (cost of living payment—the Union dropping its request for an increased payment, conditioned on wages being acceptable); there was progress on Item 6 (the proposed welfare program—the Union dropping its request for dental coverage and reducing its request from $3.73 to $2.73 per month for limited drugs and optical coverage); the parties agreed on Item 7 (the Company agreeing to broader maternity benefits and to a $2,000 increase in life insurance); the Union accepted the Company's proposed language on Item 8 (the Union dropping its request for sick days and accepting the language of the Company's proposed perfect attendance bonus); the parties agreed on Item 9 (the Company granting Union's request to increase the number of unexcused absences from 5 to 8 days a year for discharge, and the Union agreeing to

5-day suspension after five unexcused absences); the Union dropped Item 10 (improved vacation schedule); the parties agreed on Item 11 (permitting 2 months leave of absence after 5 years instead of 10); and the parties agreed on Item 12 (adequate eating facilities and telephone booth).

Concerning wages, President Robbins described to the union bargaining committee the Company's serious financial problems (discussing restrictive government regulations, limited availability of raw material, the government make-work program, etc.), and presented to the committee a quarterly income statement (showing, before taxes, a January profit of $58,000, and losses of $83,000 and $128,000 in February and March). Robbins stated that the Company "didn't project any profit, at least until the end of the year." Apparently anticipating future profits (from improvements in the commodity market and from increased, more efficient production resulting from its ongoing expansion program), the Company on April 22 proposed a 3-year agreement, with an 8-cent increase at the beginning of the first year, a 10-cent increase the second year, and a 12-cent increase the third year, totaling 30 cents. Finally, during a caucus in the April 28 bargaining session, Robbins obtained from his controller's office a 3-year projection, "utilizing expectations in terms of the size of the bargaining unit," etc. According to Robbins, "what we came up with was an absolute maximum figure ... of 15 cents each of the three years." He then presented this 15-15-15 cent proposal, totaling 45 cents, to the Union.

The Union originally proposed on April 22 a wage increase of 15-12-10 percent (which the Company computed, on a medium rate of $4.10 an hour, to be a total of $1.70 over the 3 years). On April 28, the Union lowered its request to a 12-10-10 and then to a 10-9-9 percent increase (computed by the Company to be total increases of $1.45 and $1.16 over 3 years).

Thus, at the third bargaining session, the Company increased its total wage proposal 15 cents an hours (from 30 to 45 cents), and the Union decreased its total wage proposal 54 cents an hour (from $1.70 to $1.16), reducing the gap from $1.40 to 71 cents over the 3-year period. In the hope of resolving this difference and concluding negotiations on the whole agreement, the Company and the Union agreed to continue bargaining on May 6 in the offices of the Federal Mediation and Conciliation Service.

Meanwhile, the Union indicated its willingness—in lieu of going on strike Monday morning, May 2, following the April 30 expiration of the old agreement—to an extension of the agreement, with the negotiated wage increase being made retroactive to May 1. President Robbins would not commit the Company to extending the old agreement, but he indicated that he would advise the Union about Monday, May 2, after conferring with Company Attorney Carey. (As credibly testified by Union President Mitchell Holloway and International Representative Joseph Abbatemarco, President Robbins asked near the end of the April 28 negotiations whether the Union would agree to an extension of the old agreement *if* Robbins agreed to retroactivity; Holloway answered that he would; and Robbins said he would have to speak with Attorney Carey about it. I discredit Robbins' claim that he said he would have to check with Carey only about the function of Federal Mediation.)

The employees continued to work on Monday, May 2 (the first workday after the expiration of the old agreement). Not hearing anything further about the contract extension and retroactivity, Union President Holloway went to the plant on Monday afternoon, responded negatively to questions about retroactivity as employees were getting off work around 4:30; and spoke to Company President Robbins a few minutes later when Robbins came to the employee entrance. Holloway asked Robbins if there was an agreement on retroactivity. Robbins answered that he was "still trying to get in touch with Mr.

Carey." Holloway made it clear that the employees would continue to work only if the Company agreed to retroactivity during further negotiations. As Holloway credibly testified, he told Robbins "I would be back at 7 o'clock," and that if Robbins agreed to retroactivity, "I would make sure there was no misunderstanding among the employees."

I find the evidence clear that Robbins gave fabricated testimony about this conversation and about the employees then going on strike. In support of the Company's contention early in the trial (Tr. 143) that "A strike ensued at 4:30 in the afternoon when the employees in mass left the building and the process continued and the cheese went over the hopper onto the floor," Robbins testified that about 4:30 or 4:31, Production Manager Jerry Ross informed him over the intercom that the (14 process line) employees had been "walking away from the line" although "he had told them quite emphatically that they had an obligation to work overtime," and asked Robbins "what should he do?" Robbins then claimed that he went to the process line (after 4:30 p.m.), saw the arm in motion on the filling machine (indicating that the machine was still running), and observed the production supervisor and a member of the cleanup crew "scooping up some [spilled] cheese." He testified that he then went outside the employee entrance and claimed that he told the group of employees there, in substance, "What are you doing out here? There is work to be done." To the contrary, Production Manager Ross admitted that he had already withdrawn the last two batches of cheese from production, that the process employees had finished the remaining work before 4:30 and left, and that as he recalled, Robbins had come into the plant about 4:30 and helped him push the tables of opened, unused raw cheese (which he had withdrawn from production) into the refrigerator. Thus the overtime work had been canceled (as the employee witnesses testified), and there was no machinery left running, no cheese going over the hopper onto the floor, no spilled cheese being scooped up, no reason for

Robbins asking employees outside what they were doing there and telling them there was work to be done, and no strike that afternoon. (There had been a dispute concerning the assigning of overtime. Robbins' own minutes of the May 6 negotiations reveal a dispute over the employees expecting "at least one hour notice if there is going to be overtime." These same minutes further belie Robbins' testimony by stating that "the process line was run out and emptied earlier than schedule, causing some prepared raw material to be returned to storage.") After giving the fabricated testimony about employees walking off the job, Robbins claimed that Union President Holloway, who was standing outside the employee entrance, said in effect, "We don't have a contract, we don't owe you anthing .... I thought we had an extension and I understand that Mr. Carey contacted the Federal Mediation Service and advised them that there was no extension and no retroactivity." I credit the denials and discredit this testimony as well. (From his demeanor on the stand, Robbins did not impress me as being a candid witness.)

President Robbins was most evasive when questioned about his knowledge of Attorney Carey's successful union-ousting efforts. On cross-examination by the union counsel, Robbins testified:

> Q. Isn't it a fact that Mr. Carey has told you that he has had experiences in other plants where he has successfully engineered getting the union out?
>
> MR. CAREY: I object to that ...
>
> A. I think I can answer that.
>
> JUDGE LADWIG: Overruled.
>
> A. Mr. Carey and I really do not discuss other cases. I assume he's a successful labor attorney, and therefore, I am pleased to have him as the Northfield Cheese attorney. His other cases, winnings or losings, is no affair of mine.

Q. I am talking about cases. I am talking about other clients.

A. Clients.

Q. Other clients that are part of the Kane-Miller chain, other subsidiaries. Hasn't Mr. Carey advised you that he has been successful in getting the union ousted in other plants?

A. As a reason for my using his services or—

JUDGE LADWIG: No. Could you answer the question directly?

A. I am not sure I understand the question. Has he boasted—

Q. .... Do you know whether or not Mr. Carey has been involved in other situations in which unions have represented employees at Kane-Miller plants and the unions have been ousted, do you know that?

MR. CAREY: I object [to relevancy].

JUDGE LADWIG: Overruled.

MR. CAREY: I have a continued exception, Your Honor, to all of these rulings.

A. I am very poorly informed of Mr. Carey's other activities. I do know that he does a great deal of work with other subsidiaries of Kane-Miller Corporation. I couldn't quote to you no matter how hard I tried to explain exactly specifically those activities—what those activities are.

JUDGE LADWIG: Could you answer the question directly?

A. The answer is no. I don't recall exactly the wording of the question.

Q. ... Are you aware as to whether or not Mr. Carey has been involved on behalf of other Kane-Miller subsidiaries in successful efforts to oust unions from those subsidiaries, including the Meat Cutters Union?

A. I am indirectly aware of such, yes.

Q. And you were aware of it at the time ... you went in and made your proposal on May 6th, weren't you?

A. Yes.

C. **Poststrike Negotiations**

1. Summary of Company's bargaining tactics

A close analysis of the Company's bargaining tactics which the Company pursued after President Robbins consulted with Attorney Carey, shows that they included the following:

First, the Company decided not to extend the old agreement, and not to agree to wage retroactivity, knowing that this would result in a strike.

Second, it withdrew all of its earlier proposals, including the 45-cent wage proposal and its prestrike tentative agreements on most of the proposed contractual changes.

Third, it proposed a 1-year contract, continuing *all* of the terms and conditions of the old agreement, except for the elimination of the union-shop and checkoff provisions which had previously remained unchallenged in the union agreements over a period of about 20 years.

Fourth, it met with strike replacements, advised them that it had withdrawn the compulsory-membership and checkoff clauses in negotiation with the Union, and gave them an unsolicited promise that they would not have to join the Union or pay dues. When the Union sought to negotiate about union security, the Company indicated a closed mind on this man-

datory subject of bargaining by President Robbins stating that he "gave his word to each" of the strike replacements that "they would *never* have to belong to a union or pay union dues." (Emphasis supplied.) The Company continued after the termination of the strike to give new employees unsolicited promises that they would not have to join the Union or pay dues.

Fifth, it continued to withhold any wage offer and its other prestrike proposals and concessions until after the strike was broken and the Union made unconditional offers to return to work.

Sixth, it falsely advised the Union that all of the strikers had been permanently replaced, and delayed offering reinstatements, with the result that many former strikers failed to accept offers of reinstatement when finally made.

Seventh, it attempted to turn the former strikers against the Union by falsely advising them that "The Union expressed its position [in negotiations] that it would not compromise its need for a closed shop *even if it blocks the opportunity for employees to return to work at this time.*" (Emphasis supplied.)

Eighth, it finally changed its position on the union security issue (by announcing that its no-compulsory-membership, no-dues commitment to the strike replacements would end after the expiration of even a 1-year or 6-month agreement); however, it waited to do so until after it had challenged the Union's continued majority status—obviously anticipating that before the next round of negotiations, a decertification petition would be filed.

After Attorney Carey joined President Robbins in representing the Company in the negotiations, the parties engaged in 13 bargaining sessions over an 11-month period (from May 6 to April 6,1978), but no agreement was reached.

2. Decision to withdraw proposals

Late Monday afternoon, May 2, after Company President Robbins stated to Union President Holloway that he was "still trying to get in touch with Mr. Carey" (concerning contract extension and retroactivity), Robbins had a long telephone conversation with Attorney Carey concerning the Company's strategy. Carey dictated to Robbins a letter to be delivered by him to the bargaining unit employees at 7 o'clock the next morning, the time Robbins had agreed to meet with Holloway to give him the Company's decision on retroactivity. The letter stated that "Management has refused a contract extension, and will not provide retroactive pay when a new Agreement is completed." Thereafter in the letter (as in the letter Robbins distributed to the employees a year earlier), Robbins on behalf of the Company referred to its wage offer and advised them of its right to carry on its business in the usual manner during the strike, to hire permanent replacement employees, to refuse to discharge permanent replacements as part of a strike settlement, etc.

Robbins also wrote out the Company's position, on a piece of paper which he later copied verbatim in the revised minutes he prepared following the next negotiating session with the Union. The paper read:

> a. Northfield *is not extending* [emphasis supplied] the Collective Bargaining Agreement terminated 12:01 am May 1, 1977.
>
> b. Northfield withdraws Union Security i.e. compulsory union membership (article 3B of contract).
>
> c. Northfield withdraws check-off of union dues and initiation fees (article 3C).

I note that when Robbins copied this "A-B-C directly off that document" (Tr. 1129) into his revised minutes of the May 6 bargaining session (U. Exh. 2), he copied the words as written,

"is not extending"; but because the tense was wrong at the time of the session, he later drew lines through the "is" and the "ing," changing the words to read, "did not extend." Robbins was quite evasive upon being repeatedly asked on cross-examination when it first entered his mind to withdraw the union security provisions. He finally testified that he believed it was in a telephone conversation with Attorney Carey on May 5, or "It may have been May 4th," and "Certainly" after April 28th. In view of his seeming lack of candor on the stand, the wording he used when writing the document (that the Company "is not extending" the agreement), and his testimony that "The action of May 6th was combined in bargaining tactic with the refusal to grant retroactivity," it appears likely, although I need not decide, that Robbins wrote down the Company's "A-B-C" position during his long telephone conversation with Carey on May 2, not immediately before the May 6 bargaining session as he testified.

About 7 o'clock on Tuesday morning, May 3, President Robbins began distributing the letter (dated "May 3, 1977 7:00 am") to the employees, handing the first copy to Union President Holloway, who was late arriving. (Under thse circumstances, I find no merit to the General Counsel's contention that by distributing the letters to the employees, before advising Holloway that there was no agreement on retroactivity, the Company was negotiating directly with its employees thereby bypassing the Union. I therefore dismiss that allegation in the complaint.) When Holloway arrived (before time for the employees to report to work) and asked Robbins about the letter, Robbins answered, "Well, you can read it for yourself." Holloway responded, "Well, okay, based on this, you have a strike." All of the production and maintenance employees then left the premises and went on strike. (The so-called "mixed" cleanup crew, which had worked until 7:30 the evening before, also joined the strike later that morning.)

President Robbins testified (on direct examination), "I was unsure or uncomfortable frankly with the *severe tactic* [emphasis supplied]" which Attorney Carey was recommending that the Company follow in its poststrike negotiations with the Union. However, immediately before the May 6 bargaining session with the Union, Carey showed Robbins the Board's decision in *Midwest Casting Corporation*, 194 NLRB 523 (1971), and "we went over almost line by line the . . . Board decision," and found that "it corresponded to what we were doing." (In *Midwest Casting*, 194 NLRB at 531, where the employer withdrew its entire contract proposal at one meeting and reinstated *the next day* all of the proposal except for the checkoff, there was a specific finding that the evidence "indicates genuine collective bargaining and a desire to conclude a contract," and not "bad faith bargaining"—matters in issue in the present case.) He testified, "I felt this [tactic] would have the effect that I hoped to obtain" (to "shake up the troops" and make it clear that a settlement would demand "a substantial decrease in the wage demand"), and "frankly, that it must be okay if it was in there," in that Board decision. (When asked on cross-examination about the employer in *Midwest Casting* resubmitting its proposal a day later, Robbins testified, "I didn't think . . . that the exact same time span was meaningful." Here the Company withheld its proposal for nearly 4 months, until after the strike was broken.)

On May 6 in the mediation office, both President Robbins and Attorney Carey met with the Union. (This was the fourth bargaining session, and the first of 13 in which Carey participated.) The Company said it had financial problems, that it was not really able to pay the 15-15-15 cent wage increase, and that it was withdrawing the proposals it had made to the Union on April 28. The Company also stated that it would agree only to continuing the old contract for 1 year, with the union security and checkoff provisions removed. After a caucus, the Union made a counterproposal for a 1-year agreement; reduced its wage request to an immediate increase of 20 cents (5 cents more

than the Company's previous offer), plus an additional 10 cents after 6 months; and requested certain contract changes which included several items the Company had previously offered and withdrawn. I discredit Robbins' denials that he withdrew all of the Company's previous proposals (as the employer had done in *Midwest Casting*). His own revised minutes (U. Exh. 2) belied these denials. In paragraph 3, page 2 of the minutes, Robbins wrote: "Northfield explained that they desired to continue *all the terms and conditions* of the now expired Collective Bargaining Agreement, with the exception of Union Security, and check-off, for a term of one year." (Emphasis supplied.) I also note that the Company erroneously stated in its brief that the difference between what the Union was requesting and what the Company was offering at the May 6 session and at three subsequent bargaining sessions (on May 27, June 28, and August 12) was $1.16 an hour—ignoring the contrary testimony and paragraph 6-a, page 3, of Robbins' minutes, that the Union presented a new offer on May 6 of "20¢/hr. increase upon contract with a 10¢/hr. further increase after 6 months."

President Robbins admitted that there had been "excellent movement" in the April 22 and 28 prestrike negotiation of Items 2 through 12, and also "movement" on the part of the Union on April 28 when it reduced its initial wage requests by the amount of 54 cents an hour. However, he contended that he believed the "severe tactic" which Attorney Carey recommended was required to "bring them to realize how serious I was" on the wage issue. Yet, the decision (recommended by Attorney Carey) not to agree to any extension of time for bargaining (thereby precipitating the strike) was made before the scheduled bargaining session in the mediation office could be held and before—if the Company were adamant against granting any higher wage increase—it had an opportunity to so advise the employees as it had the year before, reminding them of the consequences of a strike. (Robbins distributed such a letter to the employees *after* taking the attorney's advice not to extend the old agreement and not to grant retroactivity on wages.)

The Company's only explanation for withdrawing its agreement to compulsory union membership and checking off dues—other than the Union requiring some "shock therapy"—was that the Union "had failed to cooperate with the management committee, which was quite apparent by the wage differential, and that based upon this failure to cooperate, there was no reason that management committee should cooperate." (This contention is apparently based on language in the *Midwest Casting* decision, 194 NLRB at 527, that "The Company also said that it had only one secretary in its office to handle all the office work and in view of the Union's *lack of cooperation in not devoting enough time to negotiations* [emphasis supplied] the Company felt it should not have the burden of collecting dues and it now proposed that the Union collect its own dues." Robbins dubiously testified that he found the circumstances in that case "almost identical" to the Company's circumstances.) Yet the Union further demonstrated its flexibility on wages at the May 6 negotiations. When the Company proposed the old wages and all of the other terms and conditions of the old agreement for 1 year (minus union security and checkoff), the Union requested an immediate wage increase of 20 cents (5 cents above what the Company had offered at the last bargaining session), plus an additional 10-cent increase in 6 months. (Under this proposal, the additional 10-cent increase would be payable later in the year. Robbins had indicated the prospects of the operation becoming profitable again when he told the Union at the April 22 bargaining session that the Company "didn't project any profit, at least until the end of the year.")

Despite the Union's flexibility on wages, the Company continued to withhold any offer of a wage increase, and declined to reinstate any of its prestrike tentative agreements, throughout the May 6, May 27, June 28, and August 12 negotiating sessions. (The strike was terminated after the August 12 session.) President Robbins claimed that one purpose of his bargaining

tactics was to avoid protracted negotiations, and testified that it was his hope in every bargaining session to "resolve this situation" so that he could get back to normal production. However, he admitted that he did *not* expect the Union to take his May 6 offer seriously (Tr. 1127), testifying that it was merely a "negotiating tactic."

Thus, instead of reinstating part or all of its prestrike tentative agreements when the Union reduced its wage requests (from an amount exceeding the Company's proposal by 71 cents over a 3-year period, to an immediate increase of 5 cents above the Company's prestrike proposal, plus an additional 10 cents in 6 months) in an effort to resolve the remaining differences, the Company maintained its adamant position (of offering no wage increase and none of its former concessions) for a period of nearly 4 months—not expecting the Union to take the Company's position seriously—thereby prolonging the bargaining for at least those 4 months.

On September 2, after the strike was broken, the Company reinstated its prestrike proposals, including its proposal of a 3-year agreement, except that it reduced the proposed annual wage increase (of 15 cents) first to 10 and then to 12 cents, and restricted the union security and checkoff proposals as discussed below. The Company continued its 12-12-12 cent offer throughout the September 26 and October 11 bargaining sessions, and granted a 12-cent unilateral increase to the employees on January 1, 1978 (despite its 1977 losses in excess of $500,00, resulting from the curtailed production during and immediately after the strike, and the continuing financial problems). The Company finally raised the offer on March 8, 1978, to a 15-15 cent increase (in an 18-month agreement) and this was acceptable to the Union (as shown in the company minutes, U. Exh. 4).

3. Bargaining on union security

As indicated above, the Company's sudden May 6 reversal of its 20-year acceptance of union security and checkoff provisions was purportedly based on the Union's prestrike failure to cooperate with management in reaching an agreement on wages. Before the next bargaining session was held on May 27, the Company made an unsolicited commitment to the strike replacements, and the issue over restoring the contractual provisions precluded agreement on a new contract until the time of trial.

On May 20, President Robbins held a meeting with the strike replacements, who asked whether they were going to lose their jobs if there was a settlement of the strike. He assured them that they could stay as long as they wished, and that they would not be discharged if the strikers decided that they wished to return to work. Robbins then proceeded to inform the replacements that he had withdrawn the compulsory-membership and checkoff clauses in negotiations, and gave the replacements a commitment that they had a "complete choice" on whether they joined the Union and paid dues.

In the September 2 bargaining session, when the Company reinstated its prestrike tentative agreements on contractual changes, negotiation on the remaining issues resumed. (In the May 27, June 28, and August 12 sessions, the Company had indicated "no change" in its May 6 position that there would be no wage increase for 12 months, and no contractual changes—except for deleting the union security and checkoff provisions.) Union President Holloway credibly testified that President Robbins proposed on September 2 that as part of a 3-year agreement, there would be no compulsory membership or checkoff for the first 12 months (then reduced to the first 6 months), and that Robbins said he had given "his word to each one of the people that was hired during the strike and told them that they would *never* [emphasis supplied] have to belong to a

union or pay union dues." When testifying on direct examination, Robbins repeatedly testified falsely that during this proposed 12-month—then 6-month—suspension period, only the reinstated strikers and not the strike replacements would be required to join the Union, and that after the suspension period, the strike replacements would also be required to join: "there would be a change back to a status of full compulsory' membership with checkoff, and "everyone would be subject to a compulsory clause." (Again he appeared to be endeavoring to give testimony favorable to the Company, rather than being candid.) Finally, after being shown his September 7 letter to the former strikers, Robbins admitted that his preceding testimony was erroneous. (The letter stated that "Compulsory union membership and deduction of dues from wages would be suspended for the first six months of the three year contract under Management's offer. Also, any permanent replacement employees remaining after the sixth month would *remain exempt* [emphasis supplied] from compulsory Union membership.")

The Union continued to seek a restoration of the prestrike union-shop and checkoff provisions, and President Robbins continued to refuse, stating that it was a matter of his personal credibility, that he had given the strike replacements his word. Even after all of the previous strikers had been offered reinstatement, Robbins continued to make the commitment to new employees. As late as March 30, Robbins told a new employee that "he wouldn't have to pay union dues or join the Union." (Robbins testified that after the strike, applicants asked questions "concerning will I have to pay dues or if I do, what does it cost, do you have a union, those sort of questions.")

President Robbins' actions finally revealed that his motivation for making the commitment to the strike replacement, and for telling the Union that he could not restore the prestrike union security provisions because of his word that the replacments would "never" be required to join, was related to the Union's status as the majority representative. In the January

16 negotiations, Robbins questioned whether the Union still represented a majority of the 45 current employees, after only 16 (out of approximately 39) of the former strikers had been reinstated. At the next session, the Company announced that it was willing to continue bargaining. (The trial herein was pending, but had been postponed at the request of the Company.) The Company thereafter in April refused the Union's proposed compromise of July 1 as the cutoff date for exempting strike replacements from the union-shop provision. (The number of strike replacements hired before July 1 and remaining on the payroll was 12—several *fewer* than the number of reinstated former strikers.) However, apparently anticipating a decertification petition being filed before the next round of negotiations, the Company reversed its position on "never" requiring the strike replacements to join the Union and pay dues. The Company proposed a 1-year agreement, and then a 6-month agreement, telling the Union that after the expiration of such a short agreement, the Company's no-union, no-dues commitment to the strike replacements "would have been satisfied, and we'd go forward into the next bargaining agreement clear of this issue"—not mentioning the anticipated decertification petition in the meantime.

4. Bargaining on reinstatements

The Company had begun an expansion program before the May 3 strike, adding new cutting and packaging equipment in order to increase profits. About August, new Swiss cheese cutting equipment was installed, producing about five times as much as the replaced equipment and requiring "many more people to keep it fed with the raw materials" and "more people for packaging."

On May 3, there were 39 or more bargaining-unit employees who went on strike. They were the 32 alleged discriminatees involved in this proceeding (named below), 3 other strikers who were reinstated (Joyce Marion, Pura Savinon, and Elizabeth Sunga, see list of employees on the April 6, 1978 payroll, R.

Exh. 2), and 4 strikers whose discharge for strike misconduct is not alleged to be illegal (Hector DeJesus, Eleodora Hernandez, Pascual Morillo, and Santo Rubio). The evidence does not disclose whether 2 additional persons (Gary Love and Jose Urena, named in the Union's September 1 charge) were also striking bargaining-unit employees. (Without producing company records, President Robbins estimated that there were 38 members of the bargaining unit employed on May 2.)

There was a sharp drop in production during and immediately after the strike. The process line was shut down from May 3 until May 10 or 11. The office and management personnel were performing some packaging during that time. The Company hired two employees (Filipe Kerveadou and Julio Lozano) on May 10; two on May 11 (employees who worked that day but respected the picket line on May 12); and eight applicants on Friday, May 13, to begin work the next Monday. During the week of May 16, the Company reached a complement of 28 people (including office and management personnel), producing about 28 to 30 batches a day—about 60 percent of the prestrike production of 49 batches a day. Despite the necessity of expanded production for profitability, the Company treated this reduced crew of 28 persons as a "full" complement during the strike, relieving the non-unit personnel from bargaining-unit work as employees were hired or reinstated.

On July 18, the Company had the opportunity of restoring its full productive capacity by reinstating experienced strikers while continuing negotiations, but it failed to do so. On that date, it received two mailgrams from the Union, dated July 15:

> Local P-653 who represents the workers on strike against your Company will agree to send these workers back to work unconditionally pending future negotiations. (Sent at 9:03 a.m.)
>
> We ask that you reinstate all these workers immediately. (Sent at 9:25 a.m.)

In its brief, the Company contends that these mailgrams were not effective as an unconditional offer because they "demanded the immediate reinstatement of all the strikers without [termination] of the strike." However, it is clear that this is merely an afterthought. President Robbins on July 19 sent a reply telegram which stated:

> This will acknowledge receipt on July 18, 1977 of your mailgram in which *I undersand* you to have made an *unconditional offer on behalf of the striking employees* of Northfield *to return to work.*
>
> Please be informed that the employer has exercised its legal right to hire permanent replacement employees and as *all of the striking employees have been*, in fact, *permanently replaced* and there are, *therefore, no job openings at this time.* (Emphasis supplied.)

Thus, Robbins interpreted the union offer as an unconditional offer for the strikers to return to work, but he *claimed* that "all" of them had been permanently replaced and there were, "therefore, no job openings at this time."

President Robbins' claim was false. When asked on cross-examination how many permanent strike replacements had been hired by July 15, Robbins answered, "I don't really know. Some people had returned [presumably referring to striking employees Joyce Marion and Pura Savinon]. In terms of the strike replacements, there would probably be *about fifteen or sixteen.*" (Emphasis supplied.) The Company stipulated that one additional strike replacement (L. Fernandez) was hired on July 18—between the July 15 date of the unconditional offer for the strikers to return to work and the July 19 date of the claim that all (approximately 39) of the strikers had been permanently replaced. (I note that although the company counsel checked the Company's payroll records "late last night" after Robbins had given the estimate of 15 or 16 permanent replacements hired

by July 15—see Attorney Carey's statement, Tr. 1264—the Company did not produce any records to prove that a larger number had been hired by that date.)

After sending the inaccurate telegram, stating that there were no job openings because all of the striking employees had been permanently replaced, the Company continued to hire strike replacements (Marc Nicolas on July 25, Jean Etienne on August 5, and Duckens Souffrant and Jean Surin on August 11). President Robbins at one point (Tr. 1140) testified that "After July 15, anybody that was hired were reinstatements of the strikers." However, he then revealed, on further cross-examination, that the "preferential hiring program [for reinstating former strikers after the termination of the strike] may have been a few weeks after that." Still later, he testified that there "may have been one or two" hired after July 15, explaining that "if a job had to get done ... and it would have been detrimental to function, and someone came to the waiting room and applied, conditions required that we would hire someone under those conditions." I note though that between July 18 and September 1, the Company did not offer reinstatement to *any* of the strikers (except Elizabeth Sunga who individually crossed the picket line and applied for work on August 9). I find that that the real reason for President Robbins' continuing to hire permanent replacements was the fact that he had not yet decided to give preference to the strikers seeking reinstatement.

At the next negotiating session on August 12, as Union President Holloway credibly testified, President Robbins initially stated that the Company had "no responsibilty" to the striking employees, stating that they all had been permanently replaced. Robbins himself testified (Tr.728-729):

> Q. [By Mr. Gordon] I said didn't you take the position that you had no obligation to put them back at all?
>
> A. I didn't feel any more obligation as economic strikers to put them back than I did under the proposal of

[Union Attorney] Gordon that they were unfair labor practice strikers.

Q. There was no obligation to put them back at all?

A. That's correct.

Q. Even as vacancies became available?

A. That's correct.

Q. That was [Company Attorney] Carey's advice to you, was it not?

A. That's correct.

* * *

Q. And you really began to reinstate people only when you were informed by me that you were risking a huge liability, isn't that the fact?

A. I think that's a conclusion you have drawn.

Immediately after this bargaining session, the Union terminated the strike and notified the Company by mailgram that the employees would "report to the job site on Monday August 15, 1977 at 8 AM" to return to work. The Company did not offer any of the former strikers reinstatement until September 1, when it sent offers of reinstatement to three of them.

Following the September 2 bargaining session, the Company made a move obviously intended to turn the former strikers aginst the Union. In a letter dated September 7, President Robbins reviewed the bargaining and stated that the Company had offered to "Immediately begin rehiring striking employees who wished to return to work. Jobs would be offered as they become available due to attrition or company expansion. Under this program striking employees would be given preferential hiring over any other applicants . . . The Union negotiating committee refused to accept Management's offer and explained that they will not enter into any agreement that does not include com-

pulsory membership and checkoff .... Northfield emphasized its desire to get striking employees back to work as quickly as possible without mass dismissal of permanent replacement employees." Robbins (ignoring the Company's legal obligation to offer such reinstatements—even assuming the employees had been economic strikers— and despite the fact that any dispute over union security was immaterial to that obligation), then falsely added: "The Union expressed its position that it would not compromise its need for a closed shop *even if it blocks the opportunity for employees to return to work at this time.*" (Emphasis supplied.)

The company still did not offer immediate reinstatement to enough former strikers to restore the prestrike productive capacity. By the time the Company did make valid offers to 28 of them (11 in September, 5 in October, 9 in November, 2 in December, and 1 in January 1978), 13 failed to report to work. (The four remaining alleged discriminatees were Elizabeth Sunga who was reinstated when she crossed the picket line on August 9, and Miguel Hernandez, Emilio Ramirez, and Alfreda Williams whose discharge is in issue.) As stipulated, offers of reinstatement were made as follows:

Herbert Anderson 10/24
Joseph Bergen 11/10
Pearl Bradley 11/30
Manuel Camilo 11/10
Rafael Florencio 11/28
Maria Garcia 9/8
Gwendolyn George 11/28
Jose Gortorreal 9/14
Mercedes Grullar 9/8
Simon Gruyair 11/28
Socorro Guzman 9/1
Roosevelt Hatcher 10/5
Miguel Hernandez (no offer)
Donella Lawson 9/8
Fabio Medina 11/2
Elizabeth Mercedes 10/25
Emilio Ramirez (no offer)
Jose Rodriguez 10/5
Pedro Rodriguez 11/2
Jose Rubio 11/28
Hundo Sanders 9/7
Geneva Smith 12/22
Ethel Soloman 9/8
Elizabeth Sunga 8/9
Donald Tackaberry 9/14
Virginia Thorton 9/1

Alvin Holmes 12/5	Alfreda Williams (no offer)
Sonja Holmes 1/24/78	Charles Williams 9/1
Ella Jenkins 10/5	Jose Williams 9/14

5. Concluding findings

a. **Union-ousting efforts**

This is an instance in which a respondent company has introduced evidence of private communications between its president and its attorney as a defense to an allegation of bad-faith bargaining.

Despite President Robbins' admitted reluctance to adopt Attorney Carey's "severe" bargaining tactics—after three productive bargaining sessions in which Robbins was the sole company negotiator—Robbins followed Carey's recommendation to refuse wage retroactivity (thereby provoking a strike), to withdraw all prestrike proposals, and to propose for a 1-year period *no* wage increase, and *no* contractual changes *except* deleting the union-ship and checkoff provisions which had been an unchallenged part of their agreements for 20 years. The purported justification was that the Board had approved such tactics in its *Midwest Casting* decision (a largely inapposite case, 194 NLRB 523), and that such negotiating tactics were necessary to induce the Union to reduce its wage demands.

Despite the fact that the Union at the next (May 6) bargaining session reduced its wage request to an immediate 20-cent increase (5 cents above what the Company had offered), and an additional 10-cent increase after 6 months (close to the time when the Company had indicated a possible return to profitability), President Robbins—joined by Attorney Carey in the 13 poststrike negotiating sessions—adamantly maintained the Company's no-wage-increase, no-contractual-changes, no-union-security position for nearly 4 months, until after the strike was broken. Furthermore, before giving the Union the

opportunity to bargain on union security at any of the succeeding bargaining sessions, the Company began on May 20 making unsolicited commitments to strike replacements that they would not have to join the Union or pay dues. After the strike ended, the Company continued to make such unsolicited commitments to new employees, thereby precluding an open mind and good-faith bargaining on that mandatory subject of bargaining during a number of bargaining sessions when restoration of the union security and checkoff provisions was the principal issue between the Company and the Union.

Meanwhile, instead of bargaining to resolve the greatly reduced difference in the Company's and Union's wage proposals in the May 6 bargaining session, the Company endured a long, costly strike and reduced its productive capacity by about 40 percent—notwithstanding the fact that the Company had already embarked on an expansion program after deciding that increased production was necessary for profitability. The Company refused to offer immediate reinstatement to any of the experienced employees pursuant to the Union's July 15 and August 12 unconditional offers, and thereafter kept its productive capacity low for several additional months as it delayed recalling the former strikers. This reduced production contributed to the Company's financial problems which resulted that year in losses exceeding $500,000.

At the trial, during which significant parts of President Robbins' testimony were belied by his own minutes (of the May 6 negotiations) and by his September 7 letter to employees, Robbins denied that he had discussions with Attorney Carey "about the procedure for eliminating the Union from the plant." However he finally admitted *after much evasion* that when he made the May 6 proposal recommended by the attorney, he was aware that Carey (an official of the parent company, Kane-Miller Corporation) had "been involved on behalf of other Kane-Miller subsidiaries in successful efforts to oust unions from those subsidiaries, including the Meat Cutters Union."

Robbins also admitted that he did not expect the Union to take seriously the Company's May 6 offer (which it refused to change throughout the strike).

The Company argues in its brief that it was not "out to break the Union by engaging in surface bargaining." After considering all of the evidence and circumstances, I find to the contrary that by adopting the attorney's "severe" bargaining tactics (refusing to offer any wage increase or other prestrike concessions and withdrawing its long-standing agreement to union-shop and checkoff provisions), the Company was engaging in bad-faith bargaining without any intention of reaching an agreement throughtout the 14½-week strike, in the hope of first breaking the strike and then ousting the Union, thereby violating Section 8(a)(5) and (1) of the Act. I also find that after the termination of the strike, the Company continued to bargain in bad faith concerning union security. Although an employer or union may, in good faith, refuse to agree to a proposal and refuse to make a concession under Section 8(d) of the Act, I find that the Company's position on exempting new employees from union-security provisions was taken in bad faith, in furtherance of its union-ousting efforts. I therefore find that in the nine bargaining sessions from September 2 through April 6, 1978, the Company violated Section 8(a)(5) and (1) of the Act.

In its motion to reopen the hearing (see footnote 2 above), the Company refers to the execution on December 28, 1978, of a new, 1-year agreement as "documentary evidence that the labor dispute that gave rise to the alleged surface bargaining charge in Case 22-CA-7799 has been settled." Of course, such a settlement of the underlying labor dispute would not release the Board of its responsibility to remedy such serious unfair labor practices committed by the Company. Moreover, the new agreement (R. Exh. 24), expiring September 30, 1979, does not indicate that the Company has dropped its unlawful union-ousting efforts. To the contrary, the agreement indicates that

the Company has continued its bad-faith bargaining on the subject of union security inasmuch as Article 3, Section B-1, provides that "There will be no compulsory Union membership required of any employees who was hired before October 1, 1978." This provision exempts from union-shop coverage not only the reinstated strikers (whom the Company sought to turn against the Union by falsely linking the union shop with their reinstatement rights in its September 7 letter), but also the strike replacements and new employees hired after the strike (to whom the Company made unsolicited commitments on union membership and dues, as part of its union-ousing efforts). The Company had made somewhat similar proposals before the trial as part of these unlawful union-ousting efforts. It proposed then that union security would cover those hired since the date of execution of a new agreement, and also proposed that its no-union, no-dues commitment to the strike replacements "would have been satisfied" after the expiration of a short agreement, "and we'd go forward into the next bargaining agreement clear of this issue." The latter proposal was a reversal of the position the company took on September 2 when President Robbins told the Union that he had given his word that strike replacements would *never* have to belong to a union or pay union dues, and the Company took this reversed position after challenging the Union's continued majority status. Thus, the Company was endeavoring, before the trial, to take advantage of its unlawful delay in reinstating strikers (with the result that many of these union members did not accept the belated offers of reinstatement) and its other unlawful union-ousting efforts (reducing the Union's support and bargaining strength). It then proposed "going into the next bargaining agreement clear of" its commitments to the strike replacements, without mentioning an anticipated decertification petition in the meantime.

Under these circumstances, I find that a remedial order, requiring good-faith bargaining, is necessary to prevent the Company from benefiting from its own wrongdoing.

b. **Unfair labor practice strike**

Having found that the Company engaged in bad-faith bargaining, with no intention of reaching an agreement, from May 6 through the remainder of the strike, I agree with the General Counsel that the May 3 strike was prolonged by the Company's bad-faith bargaining and "was converted to an unfair labor practice strike as of May 6, 1977." I therefore find that the Company was required on July 18 (when it received the Union's July 15 return-to-work offer, which the Company acknowledged on July 19 to be "an unconditional offer") and again on August 15 (upon receipt of the Union's August 12 renewed unconditional offer) to reinstate the unfair labor practice strikers who had not been lawfully discharged for strike misconduct, displacing if necesary any employees hired since May 6 when the strike became an unfair labor practice strike. Accordingly, I find that by refusing to reinstate the employees on July 18 and August 15, the Company discriminated against them in violation of Section 8(a)(3) and (1) of the Act. I also find that by delaying and refusing to reinstate 29 of the employees until valid offers of reinstatement were made on the stipulated dates in the period from August 9 through January 24, 1978, the Company discriminated against them in violation of Section 8(a)(3) and (1) of the Act.

D. **Discharges During Strike**

There was an incident of strike violence on May 12 when new employees Julio Lozano and Filipe Kerveadou arrived for work. Lozano's car was damaged, Lozano was assaulted, and neither employee thereafter returned.

On May 13, the Company sent discharge letters to seven of the strikers for engaging in strike misconduct. The General Counsel does not challenge the discharge of four of the strikers, Hector DeJesus, Eleodoro Hernandez, Pascual Morillo, and Santo Rubio. The complaint does alleged that the Company

unlawfully discharged the other three strikers, Miguel Hernandez, Emilio Ramirez, and Alfreda Williams for assisting the Union and engaging in protected picketing activity. The Company contends that Miguel Hernandez was discharged for throwing a rock-like object and shattering the windshield as the car was entering the driveway; Ramirez, for beating with fists on the shattered windshield; and Alfreda Williams, for throwing a heavy object at the windshield, shattering it, also at the picket line. The General Counsel's witnesses testified that no damage was done to the car at the picket line, and that the damage was done (by others) at the rear of the plant.

The testimony appeared to be in great confusion until the General Counsel called the last witness, striker Charles Williams, who was not accused of any misconduct, who impressed me (from his demeanor on the stand) as being an alert, honest witness with a good memory, and who was in a good position to observe what happened at the picket line.

While testifying on cross-examination, Charles Williams gave a detailed, credible account of what actually happened. He was on the picket line before work that morning when two new women employees, who had worked the day before, arrived in their car. He met them in the street and they agreed to honor the picket line and left. In the next car there were two new Spanish-speaking employees (Lozano and Kerveadou). He and Pascual Morillo walked to the car as it was moving slowly through the picket line. He asked the driver to roll down the window so they could talk. The driver refused to do so until striker Elizabeth Mercedes came over and spoke to the driver in Spanish. The driver then rolled down the window slightly. Williams went to the other side of the car to speak to the passenger, who immediately locked the door. At that moment, the car jerked forward, and Williams saw President Robbins (who was standing toward the building to the right—passenger side—of the driveway near the Company's guard) waving for the driver to continue coming in; and Williams caught a glimpse of striker

Ramirez (who was on his way—in front of the car—to the driver's side to talk to Mercedes) being bumped to the ground by the car. The car stopped while Ramirez was getting up, and Robbins was again waving for the driver to come on in. As the car jerked forward a second time, Morillo was hitting on the hood (causing no damage), and something was thrown at the car. Williams observed striker Alfreda Williams' hand coming across his shoulder, saw something hit the metal band at the top of the windshield (causing no damage), and realized it was an egg because a piece of the shell hit him in the face. (Alfreda Williams credibly testified that she had started eating a boiled egg and threw it in disgust. Charles Williams demonstrated how Alfreda Williams threw it, extending her hand and arm straight outward from her shoulder, "the way a woman throws." (No other object struck the car, which proceeded to the back parking lot. Alfreda Williams was shouting for the strikers not to go on company property, but several of the 'hotheads," after picking up pieces of tree limbs, etc., in the wooded area to the left of the driveway, ran after the car. Robbins ran into the office. Assistant Controller Lawrence Needleman first came out the front door and ran to the back. Then Assistant Production Manager Glenn Messner came out, followed by Robbins, and they also ran to the back. After the police arrived and as the car was being towed away, Charles Williams saw that all of the windows in the car were cracked or broken. (The four other discharged strikers were taken to the police station, but not Miguel Hernandez, Ramirez, nor Alfreda Williams.)

Charles Williams positively and credibly testified that no damage was done to the windshield or to any other part of the car at the picket line; that Morillo (one of the four arrested strikers) was the only striker who struck the car there in front; and that the egg was the only object which hit the car at the front entrance.

The Company's witnesses, Robbins, Messner, and Needleman, did not mention Charles Williams' turning away

the first car, nor Robbins' waving for driver Lozano to come in. They gave conflicting accounts of what happened, and I find that their testimony was largely fabricated.

Messner, but not Needleman, claimed that he saw striker Miguel Hernandez throw a rock or piece of metal at the windshield as the car was entering the driveway, knocking a hole in the windshield and shattering it, like a cobweb. He also claimed that Robbins was then standing, not to the right of the driveway, nearer the building (as Charles Williams and Alfreda Williams credibly testified), but on the left side of the driveway, between the left front wheel and the driver's door. Yet Robbins, supposedly standing within a few feet of the windshield, was not aware of any such object being thrown. (I credit Charles Williams' testimony that Miguel Hernandez did not throw anything at the car.)

Needleman and Robbins claimed that they saw Alfreda Williams throw an object which "shattered" the windshield, but Needleman claimed that the windshield was already shattered, whereas Robbins testified that the first time he noticed the windshield was broken was when Williams threw the object. Messner and Robbins, but not Needleman, claimed that they saw striker Emilio Ramirez pounding on the shattered windshield. Having credited the testimony that the object thrown was the uneaten portion of an egg which Alfreda Williams had in her hand, I discredit the testimony by Needleman and Robbins that the object thrown by Alfreda Williams shattered the windshield, and the testimony by Messner and Robbins that Ramirez was pounding on the shattered windshield.

Messner and Needleman claimed that they witnessed the incident at the picket line from Robbins' office, first from the inner window and then from the corner window, but they gave conflicting accounts about this as well. Each of them testified that he was at the corner window when he saw someone (Morillo) trying to force open the driver's door (something which hap-

pened, according to Robbins, before Alfreda Williams threw the object at the windshield). Needleman testified that Messner had *already left* the corner window and the room when Needleman saw someone trying to open the driver's door, and that Needleman thereafter saw Alfreda Williams throw the object. However Messner claimed that he was *still* at the corner window when he saw the struggle over the car door. According to Messner (although not seen by Needleman who claimed he was also watching from the same window), Messner saw Miguel Hernandez throw the rock or metal at the windshield, saw Alfreda Williams just standing there (this indicating that she had already thrown the egg), and saw Ramirez pounding on the shattered windshield. The Company's brief ignores these conflicts, except to cite Robbins' testimony that he concluded from his conversation with Needleman and Messner on the day of the incident that Hernandez threw the object *before* Alfreda Williams did—contrary to what Messner testified. Thus the Company apparently knew, from the day of the incident, that there were conflicts in the versions given by Messner and Needleman. Messner was claiming that he was watching the same incident and at the same time as Needleman, yet Messner but not Needleman was claiming that he saw Hernandez throw the rock-like object and Ramirez poundinng on the windshield. At the time, Robbins instructed both Messner and Needleman to write reports of what they saw, but he proceeded to discharge both Miguel Hernandez and Ramirez, although knowing that Needleman undoubtedly would have seen the two of them engaging in such misconduct if they had actually done so.

It was under these circumstances that the General Counsel requested that the Company produce not only the written reports made by Messner and Needleman of the May 12 incident, but also Robbins' own notes of what happened. The Company refused. (Earlier in the trial, as already mentioned, the Company had produced Robbins' minutes which had belied significant parts of his testimony.) I infer that if these requested

documents had been favorable to its defense, the Company would have produced them.

President Robbins testified that if merely an egg had been thrown, it would not have been grounds for discharge because "it would be hard for me to conceive how that would be terrifying or in any way serious, threatening the occupants of the car." Having credited the testimony that part of an egg was all that striker Alfreda Williams threw (hitting above the windshield without causing any damage), and having credited the testimony that striker Miguel Hernandez threw nothing at the car and that striker Emilio Ramirez did not strike the windshield—contrary to the Company's purported reasons for discharging the three employees—I find that the Company unlawfully discharged them on May 13 for assisting the Union and engaging in protected picketing activity in violation of Section 8(a)(1) and (3) of the Act.

Conclusions of Law

1. By engaging in bad-faith bargaining, with no intention of reaching an agreement with the Union from May 6, 1977, until the end of the strike, and by thereafter continuing to bargain in bad faith concerning union security, in appropriate bargaining unit of all production and maintenance employees at the Company's Northvale plant, the Company committed unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

2. The strike which began on May 3, 1977, and ended on August 12, 1977, was prolonged by the Company's bad-faith bargaining and was converted on May 6, 1977, to an unfair labor practice strike.

3. By unlawfully discharging striking employees Miguel Hernandez, Emilio Ramirez, and Alfreda Williams for assisting the Union and engaging in protected picketing activity, the Company violated Section 8(a)(1) and (3) of the Act.

4. By refusing on and after July 18 and on and after August 15, 1977, unconditional offers for Miguel Hernandez, Emilio Ramirez, and Alfreda Williams to return to work, and by refusing on those dates unconditional offers for 29 other employees to return to work and delaying offers of reinstatement to them until stipulated dates from August 9 through January 24, 1978, the Company discriminated against them in violation of Section 8(a)(3) and (1) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order the Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having unlawfully discharged 3 striking employees and unlawfully delayed offers of reinstatement to 29 other strikers, I find it necessary to order the Respondent to offer the 3 discharged employees full reinstatement and to pay them and the 29 other striking employees for lost earnings, less net interim earnings, in accordance with the formula set forth in F. W. Woolworth Company, 90 NLRB 289 (1950), plus interest as computed in *Florida Steel Corporation,* 231 NLRB 651 (1977), from date of the Respondent's receipt on July 18, 1977, of unconditional offer for the 32 strikers to return to work, to date of proper offer of reinstatement. See, generally, *Isis Plumbing & Heating Co.,* 138 NLRB 716 (1962). Inasmuch as the Respondent's unlawful conduct goes to the very heart of the Act, I find it necessary to issue a broad order, requiring the Respondent to cease and desist from infringing in any other manner upon the rights guaranteed employees by Section 7 of the Act.

Upon the foregoing findings of fact and conclusions of law,

upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[3]

ORDER

The Respondent, Northfield Cheese Company, Northvale, New Jersey, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging, refusing to reinstate, or otherwise discriminating against any employee for engaging in protected picketing activity or for supporting or assisting Meat, Food & Allied Workers Local P-653, Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO, or any other union.

(b) Unlawfully refusing to bargain with Local P-653 as the exclusive representative of the employees in the following appropriate unit:

> All production and maintenance employees employed at the Respondent's Northvale, New Jersey plant, excluding office clerical employees, administrative employees, guards, professional employees, and all supervisors as defined in the Act.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

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[3] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(a) Offer Miguel Hernandez, Emilio Ramirez, and Alfreda Williams immediate and full reinstatement to their former jobs or, if their jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them (until proper offer of reinstatement) and the following 29 former strikers (until the dates of proper offers shown after their names) whole for any loss of pay or other benefits since July 18, 1977, in the manner set forth in the Remedy section:

Herbert Anderson	10/24/77	Donella Lawson	9/8/77
Joseph Bergen	11/10/77	Fabio Medina	11/2/77
Pearl Bradley	11/30/77	Elizabeth Mercedes	10/25/77
Manuel Camilo	11/10/77	Jose Rodriguez	10/5/77
Rafael Florencio	11/28/77	Pedro Rodriguez	11/2/77
Maria Garcia	9/8/77	Jose Rubio	11/28/77
Gwendolyn George	11/28/77	Hundo Sanders	9/7/77
Jose Gortorreal	9/14/77	Geneva Smith	12/22/77
Mercedes Grullar	9/8/77	Ethel Solomon	9/8/77
Simon Gruyair	11/28/77	Elizabeth Sunga	8/9/77
Socorro Guzman	9/1/77	Donald Tackaberry	9/14/77
Roosevelt Hatcher	10/5/77	Virginia Thorton	9/1/77
Alvin Holmes	12/5/77	Charles Williams	9/1/77
Sonja Holmes	1/24/78	Jose Williams	9/14/77
Ella Jenkins	10/5/77		

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Upon request, bargain in good faith with Local P-653 as the exclusive representative of the employees in the appropriate unit and embody in a signed agreement any understanding reached.

(d) Post at its plant in Northvale, New Jersey, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 22, after being duly signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS ALSO ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. February 6, 1979.

Marion C. Ladwig
Administrative Law Judge

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[4] In the event the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

NOTICE TO EMPLOYEES

Posted By Order Of The National Labor Relations Board

AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL OFFER Miguel Hernandez, Emilio Ramirez, and Alfreda Williams immediate and full reinstatement to their former jobs or, if their jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of pay or other benefits, plus interest.

WE WILL PAY the following 29 former strikers for any loss in earnings or other benefits from date of offer to return to work until date of proper offer of reinstatement, plus interest:

Herbert Anderson
Joseph Bergen
Pearl Bradley
Manuel Camilo
Rafael Florencio
Maria Garcia
Gwendolyn George
Jose Gortorreal
Mercedes Grullar
Simon Gruyair
Socorro Guzman
Roosevelt Hatcher
Alvin Holmes
Sonja Holmes
Ella Jenkins
Donella Lawson
Fabio Medina
Elizabeth Mercedes
Jose Rodriguez
Pedro Rodriguez
Jose Rubio
Hundo Sanders
Geneva Smith
Ethel Solomon
Elizabeth Sunga
Donald Tackaberry
Virginia Thorton
Charles Williams
Jose Williams

WE WILL BARGAIN in good faith with MEAT CUTTERS LOCAL P-653 upon request as the exclusive representative of our production and maintenance employees, and put in writing and sign any bargaining agreement reached.

WE WILL NOT in any manner interfere with your rights under Section 7 of the Act.

NORTHFIELD CHEESE COMPANY

(Employer)

Dated _____ By _____

(Representative) (Title)

This Is An Official Notice And Must Not Be Defaced By Anyone

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office. Federal Building — Room 1600, 970 Broad Street, Newark, New Jersey 07102, Telephone (201) 645-3652.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

- - -

Northfield Cheese Company,
Petitioner

vs.

National Labor Relations Board,
Respondent

No. 79-1888

- - -

Philadelphia, Pennsylvania
March 20, 1980

- - -

CORAM:

Ruggero J. Aldisert, J.
John J. Gibbons, J.
Louis H. Pollak, J.

- - -

APPEARANCES:

Joseph Carey, Esquire
For Petitioner

Bennet Alsher, Esquire
For Petitioner

Barbara A. Atkin, Esquire
For Respondent

- - -

[2] MR. CAREY: If it please the Court, my name is Joseph Carey, and I'm the attorney for the Petitioner, Northfield Cheese. Mr. Bennet Alsher, to my right, is also on the brief with me.

The facts, most briefly stated, are that Northfield has had a relationship, a collective bargaining relationship with the union for some twenty years. Prior to the expiration of the contract in May 1977, never had a labor dispute with the union.

Mr. Mark Robins is the president of Northfield. And I represented him and was present with him in negotiations of prior contracts. In the '77 negotiations, however, I didn't actually attend any of the bargaining sessions until the fourth session, on May sixth.

It's Northfield's position that the strike actually started on May second, not on May third, as was found by the ALJ. And I will allude to this discrepancy later.

The ALJ, found surface bargaining is a violation of Section 85, in both the bargaining from May sixth until the end of the strike, and in the post-strike bargaining that led to a contract on [3] December twenty-eight, '78, which is the Respondent's Exhibit Twenty-four, because of the limited compulsory membership that exists in the present contract. The ALJ also found violations of Section 883 for allegedly delay in reinstatement in returning the strikers, and also for the discharge of three strikers for misconduct.

An analysis of the twenty-three page decision of the ALJ shows it relied upon two factors in finding the 85 violation. The first was severe bargaining tactics. The second was the intention of then ousting the union.

As to the second ground, there are nineteen separate expressions in the ALJ's decision, ranging from ousting the union, breaking the union, anticipated decertification petition, and procedure for eliminating the union.

However, the Board, in its summary decision and order expressly rejected the conclusion of the ALJ that the company's bargaining stance was influenced by this anticipated decertification.

Now this results in the kind of serious internal inconsistency in the ALJ's decision, as this Court condemned in *NLRB versus New York* **[4]** *Kingsboro Bus Company,* which is found at 578 Fed. Second 472. By that I mean that the Board expressly rejected the finding of the ALJ that Northfield's bargaining stance was influenced by its anticipating a decertification petition being filed.

It's Northfield's position that having been cleared by the Board of the ALJ's finding of a union ousting modum, it's both sound reasoning and good logic that Northfield also did not intend by its bargaining stance to frustrate agreement. This is so, because the frustration of agreement, is the beginning of the, and I quote, procedure for eliminating the union, end quote, a phrase used by the ALJ.

One only has to contemplate the end result of surface bargaining in order to demonstrate its integral relationship with union ousting. Another argument that demonstrates the internal inconsistency in the ALJ's decision is that on page ten of the decision the ALJ calls attention to the twelve cent unilateral wage increase that Northfield implimented on January one, 78; but failed to condemn this unilateral action for the absence of **[5]** impasse that is logically the case with surface bargaining.

Therefore, the ALJ must have regarded an impasse to have existed, all of which belies the finding of bad-faith bargaining.

The Board, in its brief, attempts to misconstrue footnote twelve of *NLRB versus Katz,* the Supreme Court 369 U.S. 736, as allowing unilateral action in the absence of impasse. Footnote twelve of Katz merely distinguishes the offer of "the same as" from the offer of "more than," as was the fact in Katz. The offer in Katz was more than they offered the union, the prior offer to the union. And the offer was made before impasse, by the express language of the case.

THE COURT: Is it your position that there was not factual evidence in the record as a whole to sustain the conclusions of the ALJ?

MR. CAREY: Yes, it is, your Honor. In our opinion there is no permissible unilateral action under Katz, absent an impasse.

This internal inconsistency in the Board's decision is fatal, because there is no finding that Northfield was guilty of so-called technical **[6]** violations, like dilatory tactics or refusal to furnish necessary information for bargaining. And indeed, Northfield, without being asked, in one of the first or second bargaining . . .

THE COURT: This is a question of substantial evidence. What are you giving us this talk on the law? Isn't your argument the question of these are the facts, this was the fact?

MR. CAREY: Well, it's also an argument, your Honor, with respect to how the Board, as I see it, just disregards the constant lessons it seems to get from the Supreme Court of the subject of what is bargaining. And here we are again twenty years later.

THE COURT: Then you are saying no, this is not a question of whether there was substantial evidence in the record as a whole. This is the choice of the NLRB of the wrong legal precept. This is a mistake in the interpretation of that precept, or this is an error in the application of the precept, as chosen and interpreted.

In that case, we are not talking about a case arguing substantial evidence, are we?

MR. CAREY: Well, I think that it's both **[7]** because the . . .

THE COURT: Then I asked you before, and you said it was substantial evidence. Are you saying now that it's both?

MR. CAREY: Yes, I am, sir. I'm sorry to have misunderstood you. There is an issue of substantial evidence

with respect to the credibility resolutions. And there is this problem with respect to the Board not applying Supreme Court teachings on the subject.

THE COURT: Okay. How significant are the credibility problems with respect to the surface bargaining issue? The historical facts are not in dispute there. They are with respect to the strike misconduct.

MR. CAREY: The substantial evidence . . .

THE COURT: Or maybe I misunderstood the record.

MR. CAREY: Well, the record of course runs some fifteen hundred pages. And it's difficult to argue it in such a short time. But the ALJ's decision runs twenty-three pages. He has building blocks in his argument.

THE COURT: The building blocks are all **[8]** events which indisputably took place.

MR. CAREY: Yes, your Honor.

THE COURT: And so on the surface bargaining question, don't we come down to whether or not the building blocks he relied upon were legally sufficient to show, to support the Board's conclusion that there was surface bargaining?

MR. CAREY: Yes. But I can't see that as separate from the Board's also ignoring the teaching of the high court on the subject.

THE COURT: Well, what is the teaching of the high court on the subject?

MR. CAREY: Well, for instance, the Board, in its brief, rejects the company's contention that it's tactics constituted nothing more than hard bargaining and the exertion of economic force for the purposes of forcing a reduction in the union's wage demands.

The Board, in its brief, continued by saying that the company has a basic misunderstanding of what is hard bargaining. But the ALJ and the Board, in its decision, now the Board in its brief, never attempts to explain to us what hard bargaining is, or to then distinguish it from . . .

[9] THE COURT: But there is some point when a course of conduct crosses the line from hard bargaining to surface bargaining. What is the legal standard you have us apply for identifying that line?

MR. CAREY: I'm not sure I agree that there's some point at which hard bargaining crosses the line to become surface bargaining. That's exactly the problem I submit the Board has.

THE COURT: Well then, what doctrine supports you in that reluctance?

MR. CAREY: Well, I'd like to—the doctrine, first of all, of the Supreme Court in *NLRB* versus *American National Insurance,* and in *Shipbuilding* and in *Brown.* I'd like to explain briefly those teachings, because the Board is going to be hard pressed to explain how they've come within that teaching.

They see themselves . . .

THE COURT: The Board is going to be hard pressed? Is that a petition for review?

MR. CAREY: Yes. We are . . .

THE COURT: By you. You have the burden, don't you?

[10] MR. CAREY: Of course I do.

THE COURT: Let's hear it.

MR. CAREY: This failure to explain by the ALJ and the Board is also a practice that was condemned in this Court in the *New York Kingsboro Bus* case, because there's no explanation. They simply say this is not hard bargaining. Surface bargaining.

Now it is our position that the . . .

THE COURT: I think you have to zero in on a response to the inquiry of Judge Gibbons and Judge Pollak. The question put to you, sir, was, isn't there a point where hard bargaining crosses the line to surface bargaining? And you said no.

MR. CAREY: And I still think that.

THE COURT: Now why?

MR. CAREY: Because be it ever so hard, in the last analysis, we're not dealing with abstract logical arguments here, as was said in one of the cases. As the Supreme Court said in *Shipbuilding,* a party can't come into this arena free of any exposure to economic harm.

They take what they get. And the Board **[11]** here is lamenting time after time the position of the union at the hands of the employer. And that's exactly what they're cautioned time and time again by the Supreme Court not to do.

So I again say that hard bargaining is hard bargaining. Surface bargaining is surface bargaining. I don't think one crosses the line to the other.

THE COURT: And never the twain shall meet, even at the line?

MR. CAREY: Even at the line, your Honor.

THE COURT: Sort of a DMZ. Well, okay. Do you want to move to another argument?

MR. CAREY: Yes. I'd like to address the—well, I'd like to make one argument with respect to the, again, the Board is again making judgment about how close the parties were when I entered the case on May sixth.

The union was at a, coming into that fourth session, was at a dollar sixteen cent an hour increase over three years. The employer was at only forty-five cents.

Now to the practitioner, that's not close. But the Board is making these judgments. **[12]** And they infer from those judgments this bad faith.

THE COURT: As to all other aspects of the proposed collective bargaining agreement, had their been argument between the company and the union except this question on the wages?

MR. CAREY: There is a dispute whether or not on May sixth Robins withdrew not only compulsory membership and checkoff, but also all of the other items. And the Board says they withdrew all of the items. We say we withdrew only the wages that . . .

THE COURT: Prior to the withdrawal, at the time when you mentioned where the union was at one sixteen and the company was at forty-five, does not the record indicate that there was general agreement on the other issues?

MR. CAREY: On some of the other issues, your Honor, not all of the other issues.

THE COURT: Okay.

MR. CAREY: Now the Board criticized my advice to Robins on May sixth, at *Midwest Casting,* and said that it's not in point. However, *Midwest Casting* clearly was only six years after *Shipbuilding,* clearly repeated the teaching of the Supreme Court in *Shipbuilding, Insurance Agents,* and **[13]** in *Brown.* The Board, as their practice, merely adopted the decision of the ALJ in *Midwest Casting.* Did not—We don't know what kind of analysis they gave to it. They just adopted it.

Now the Board here though attempts to distinguish *Midwest Casting* by pointing out that the withdrawal of *Midwest Casting* lasted for only one day. And for all of the items, not just one of the items.

And I say that it's absurd to suggest that a withdrawal for one day is allowed, but a withdrawal for four months, as in Northfield, is not allowed, and that a withdrawal of one item, or rather even all of the items, if you take the Board's version of the facts, rather than one item, is also allowed. I think that's sitting in judgment on the bargaining tactics and the substantive terms of the bargaining. And I think the Board . . .

THE COURT: Maybe the rule on surface bargaining is a bad rule, but it's the law. And if there is an unfair labor practice of surface bargaining, don't you have to draw lines between one day and four months, between one item and five [14] items?

MR. CAREY: I don't know whether we have to draw lines, your Honor. But I do know that the Board has to reconcile its holding a bad-faith bargaining with the teaching of the Supreme Court with respect to economic weapons, and that that's really what we're dealing with here, economic weapons.

THE COURT: Bad-faith bargaining is an economic weapon. It's just one you can't use.

THE COURT: Mr. Carey, I understand you have said that there is not substantial evidence to support the Board. If you were to look at pages thirty-four and thirty-five, in which the administrative law judge summarizes under number one, Summary Of Company's Bargaining Tactics, if you take those eight recitals by the administrative law judge, would you say there is no evidence to support those recitals?

MR. CAREY: I think it's evidence that is improperly arrived at, because of the inference process that he engaged in. And that's exactly the point in this case.

THE COURT: Is it the Court's function to [15] review the credibility determination made by the administrative law judge? The Board has disclaimed that function, I think, in its first footnote to the opinion.

MR. CAREY: I think, fortunately being here in the Third Circuit it's the Court function, because again in the *NLRB* versus *New York, Kingsboro And Long Branch Bus Company,* this Court was very clear in its condemnation of the ALJ's making credibility resolutions, and they—where they ignore substantial facts . . .

THE COURT: Would you identify what findings that are unsupported by the evidence?

MR. CAREY: In this Third Circuit case or our case?

THE COURT: It would be better if you dealt with our case. On pages thirty-four and five.

MR. CAREY: Well, in footnote fifteen on page four seventy-eight there is a long discussion of the subject, and about what it is, the standard . . .

THE COURT: No. No. I'm sorry. You misunderstood me. I was trying to ask you to **[16]** address yourself to the record in this case here, pages thirty-four and thirty-five of the appendix, in which the administrative law judge gives a series of recitals with respect to . . .

MR. CAREY: I'm sorry. I don't have that in front of me, your Honor.

THE COURT: Well, all right.

THE COURT: Okay. I think your red light is on. Do you want to bring your argument to a close now, Counsel?

MR. CAREY: There is one concession that Northfield wishes to make. And that is with respect to Robins' testimony with respect to misunderstanding of the reinstatement rights of economic strikers.

He incorrectly testified that even as vacancies occurred, he had no responsibility to reinstate. That's not probative,

however, because if you accept the strike—rather if you accept the second telegram as the August twelfth, the unconditional offer to return as being a valid one, and not the July fifteenth telegram, there were no reinstatements—there were no hirings of replacement employees after the August twelfth [17] telegram.

THE COURT: All right. Thank you, sir.

MR. CAREY: Thank you.

MS. ATKIN: May I please the Court, I'm Barbara Atkin, with the National Labor Relations Board.

The company has characterized this case as one of hard bargaining, disclaiming any slight tendency into the surface bargaining area. But on the contrary, this is a very simple, straightforward case that clearly demonstrates surface bargaining.

The company was not very subtle. At the outset of the bargaining, bargaining was proceeding perfectly normally. There is no allegation that there is any bad-faith bargaining.

But when Mr. Carey joined the negotiations, the company abruptly withdrew all of its prior agreements, all of its tentative agreements, all of its proposals, withdrew the union's security clause and withdrew its checkoff, which had never been challenged in twenty years, and had not been discussed in bargaining prior to that point, announced it could not make any wage offer, although it had previously, after discussion with [18] the comptroller, made a wage offer of forty-five cents over three years.

It said that it could agree only to extend the contract for one year, with no changes, as I have stated. And then it took this position, without any variation, for four months, until after the union ended its strike. And then about a week after the union ended its strike, it announced that it could make a wage offer of

twelve cents, then later raised it to fifteen cents in one year, initially in a short-term agreement.

And the Board submits that there is really no clearer case of bad-faith bargaining than the facts I've just laid out before you.

THE COURT: At the time the union was at one sixteen and the company was at forty-five cents, was there general agreement on the other issues?

MS. ATKIN: Yes. Yes.

THE COURT: I have put that question to your friend, and he said "No."

MS. ATKIN: Well, the record doesn't support his answer. Other than wages, there was disagreement on a welfare plan; drugs, optical and such. But the union had just dropped its demand. **[19]** So although they were apart on that issue, the union had demonstrated flexibility. And on every other issue they had reached tentative agreement.

THE COURT: All right.

MS. ATKIN: So then the company renounced all this progress.

THE COURT: So then on the welfare plan, as you indicate, and on the wages, there was, other than those two items, there was general agreement.

Now afterwards, what was withdrawn by the company?

MS. ATKIN: Everything.

THE COURT: Everything.

MS. ATKIN: And the record supports this, clearly supports this. And we give all the record references in our brief.

THE COURT: Okay.

MS. ATKIN: As a matter of fact, the company's proposal, which it admits, of a one-year extension of the prior agreement, would make no sense if it hadn't withdrawn all of its prior proposals.

THE COURT: You've heard Mr. Carey in response to questions put to him by Judges Gibbon **[20]** and Pollak, saying that when you are discussing hard bargaining, you do not cross the line into surface bargaining. You heard his position on that.

MS. ATKIN: Yes.

THE COURT: Would you care to respond to that?

MS. ATKIN: Well, I disagree, of course. And so does this Court. When the Board can show that the positions taken by a company are taken with the intention of frustrating agreement, then the company's crossed the line into bad-faith bargaining.

Now it can be difficult to show, but it's certainly not impossible. And we more than show it in this case.

THE COURT: All right. Now how do you respond to the statements that the NLRB in this case violated or refused to follow to the decisions of the Supreme Court?

MS. ATKIN: Well, I don't really understand that argument. The Supreme Court decisions which I believe Mr. Carey refers to, simply state that the use of a lockout or strike as an economic weapon is not bad-faith bargaining. But **[21]** in those decisions the Supreme Court said—well, the facts showed that the bargaining was otherwise proceeding in good faith.

And then merely the employer's use of a lockout did not transform the prior good-faith bargaining into bad-faith bargaining. And it nowhere approved such tactics as we have here. They're completely inapposite.

With respect to the twelve-cent unilateral wage increase which the company referred to, I believe this is controlled by the

NLRB versus *Katz*. The fact that the Board did not attack this twelve-cent wage increase does not show that there was a good-faith impasse reached. It merely shows that—well, under the teachings of Katz, an employer may unilaterally institute a wage increase, if he has previously offered this wage increase to the union and the union has rejected it as too low. It then may go ahead and institute the wage increase.

Now with respect to this, the finding that the company bargained in bad faith over union security. The company bargained in bad faith on the issue of union security from May sixth, and then **[22]** continued to bargain in bad faith over this issue even after the end of the strike.

This issue was used in order to break down the exstrikers who—and weaken their support of the union. The union was in a very delicate stage of the negotiation, and needed all the support it could get. But by telling the strikers the that union was jeopardizing their restatement rights by insisting on a union security clause, the company was seriously damaging the relationship between the union and it supporters.

Furthermore, since the company volunteered to strike replacements that they would never have to belong to the union, which was not requested, an assurance which was not requested by the strike replacements, but it was sort of a gratuitous statement on behalf of Mr. Robins, the company president, the company boxed itself in.

THE COURT: Is it really fair to characterize Mr. Robins' commitment that way?

MS. ATKIN: Yes, your Honor, because . . .

THE COURT: The administrative law judge refers to it as an unsolicited promise.

[23] MS. ATKIN: So we argue in our brief.

THE COURT: The administrative law judge also says on page thirty-eight, "President Robins held a meeting with the strike replacements, who asked whether they were going to lose their jobs if there was a settlement of this strike," and then follows the recital of the assurance.

MS. ATKIN: Right. It's very different . . .

THE COURT: Would that be an unsolicited promise?

MS. ATKIN: You're talking about two very different things. Mr. Robins was perfectly entitled to tell the strike replacements that, assuming it was an economic strike, that they were premanent replacements and would not be fired at the end of the strike. That's one thing. That's entirely different. Permanent replacements are entitled, assuming it's an economic strike, to keep their jobs.

Now it's very different to go on and say, and in addition, I am currently bargaining with the union and I am going to take the position that you will never have to join the union and pay dues checkoff. It's two entirely separate matters.

Now whether there is a union security **[24]** clause with mandatory payment of dues, and whether there's a dues checkoff clause is very different from whether the replacements are going to have a job at the end of the strike.

And even all the way up to long after the end of the strike, Mr. Robins was telling the replacements this and boxing himself in. So then he could go into negotiations and say he'd given his word as a gentlemen, that he was, and he would never be able to budge in negotiations with the union.

This is bad-faith bargaining. The company has talked about the discharges during the strike.

THE COURT: Well then you don't have to rebut that.

MS. ATKIN: Good. Thank you.

THE COURT: We'll rely on the briefs.

MS. ATKIN: Thank you.

THE COURT: All right. Thank you very much. We'll take the case under advicement and we thank counsel.

— — —

(HEARING CONCLUDED)

— — —

Supreme Court, U.S.
FILED
JUL 10 1980
MICHAEL RODAK, JR., CLERK

No. 79-1823

In the Supreme Court of the United States

OCTOBER TERM, 1979

NORTHFIELD CHEESE COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

QUESTION PRESENTED

Whether the Board's finding that petitioner failed to bargain in good faith is supported by substantial evidence.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statute involved 1

Statement 1

Argument 6

Conclusion 9

TABLE OF AUTHORITIES

Cases:

Dow Chemical Co., 216 N.L.R.B. 82 7

H.K. Porter Co. v. *NLRB*, 397 U.S. 99 8

Midwest Casting Corp., 194 N.L.R.B. 523 8

NLRB v. *American National Insurance Co.*, 343 U.S. 395 ..... 6, 7, 8

NLRB v. *Insurance Agents' Union*, 361 U.S. 447 6

NLRB v. *Texas Coca-Cola Bottling Co.*, 365 F. 2d 321 7

NLRB v. *Truitt Manufacturing Co.*, 351 U.S. 149 6

Universal Camera Corp. v. *NLRB*, 340 U.S. 474 7

Page

Statute:

National Labor Relations Act,
29 U.S.C. 151 *et seq.* 1
Section 8(a)(1), 29 U.S.C. 158(a)(1) 5
Section 8(a)(3), 29 U.S.C. 158(a)(3) 5
Section 8(a)(5), 29 U.S.C. 158(a)(5) 5
Section 8(d), 29 U.S.C. 158(d) 6

OPINIONS BELOW

The court of appeals did not issue an opinion. The order of the court of appeals (Pet. App. A-1 to A-3) is unreported. The decision and order of the National Labor Relations Board (Pet. App. A-4 to A-47) is reported at 242 N.L.R.B. No. 157.

JURISDICTION

The judgment of the court of appeals (Pet. App. A-1 to A-2) was entered on March 21, 1980, and a petition for rehearing was denied on April 16, 1980. The petition for a writ of certiorari was filed on May 16, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set out in the petition (Pet. 2-3).

STATEMENT

1. Petitioner Company's production and maintenance employees have been represented by the Union[1] since approximately 1957. The last of a series of collective bargaining agreements expired on April 30, 1977 (Pet. App. A-9).

Prior to the expiration date, the parties held three bargaining sessions, on April 20, 22 and 28, 1977. The Company was represented at these sessions only by its president, Mark Robbins (Pet. App. A-10). By the end of the April 28 session, the parties had reached agreement on virtually all issues except wages and the Union's proposed

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[1]Meat, Food & Allied Workers, Local P-653, Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO.

welfare program (Pet. App. A-10 to A-11). The difference in the parties' proposed wage increases over a three-year contract had been reduced from $1.40 to 71 cents. The Union had twice reduced its opening proposal, resulting in a decrease from $1.70 to $1.16. The Company had raised its opening proposal by 15 cents, to a total of a 45-cent increase over three years (Pet. App. A-11 to A-12). With respect to the welfare program, the Union had decreased its demand significantly (Pet. App. A-10). At the Union's suggestion, the parties agreed to call in the Federal Mediation and Conciliation Service (FMCS) at the next meeting scheduled for May 6, 1977, to resolve the remaining issues (Pet. 6; Pet. App. A-12). Robbins then suggested extending the contract beyond its expiration date and making any negotiated wage increases retroactive to May 1, 1977. The Union agreed, and Robbins said that he would check with the Company's attorney and let the Union know on Monday, May 2 (Pet. App. A-12).

During the late afternoon of May 2, Company attorney Joseph Carey advised Robbins not to agree to extend the contract or to pay retroactive increases (Pet. App. A-18). When the Union was so informed on Tuesday, May 3, all of the employees went out on strike (Pet. App. A-19). Thereafter, the Company, adopting the "severe [negotiating] tactic" suggested by its attorney, completely changed its bargaining posture (Pet. App. A-20 to A-22; A. 472, 594-596).[2]

Thus, at the next bargaining session, held on May 6, 1977, in the FMCS offices (the first bargaining session attended by Attorney Carey (Pet. App. A-20)), Robbins, reading from a prepared statement, announced that the Company was not able to pay the 15-cent per year (for

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[2] "A." references are to the joint appendix filed in the court of appeals.

three years) wage increase it had proposed on April 28 and was withdrawing all of the proposals it had made on April 28 (Pet. App. A-20; A. 112, 240-241, 295-296, 345). Robbins said the Company would agree only to continuing for one year the provisions of the old contract, including the old wage rates. Moreover, Robbins said, the existing union security and checkoff clauses would have to be omitted (Pet. App. A-20; A. 113, 241, 295-296, 353, 782). This was the first time in the 20-year history of bargaining between the Company and the Union that the Company had proposed the elimination of the union security and dues checkoff clauses (Pet. App. A-16).

Despite various Union counterproposals (Pet. App. A-20 to A-21; A. 114-115), the Company continued to withhold any offer of a wage increase and declined to reinstate any of its prestrike tentative agreements with the Union during the three succeeding bargaining sessions held before the strike was terminated on August 12, 1977 (Pet. App. A-22).[3] At the first bargaining session after the

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[3]Earlier, on July 15, the Union had made an unconditional offer to return to work, requesting reinstatement of the strikers. The Company had rejected the Union's offer to return to work, informing the Union on July 19 that all of the striking employees had been permanently replaced (Pet. App. A-27 to A-28). In fact, only about 15 or 16 strike replacements had been hired by July 15 (in a prestrike unit of 39 (Pet. App. A-9)), one was hired on July 18, and four more were hired by August 11 (Pet. App. A-28 to A-29). At the August 12 session, Robbins told the Union that the Company had "no responsibility" to reinstate the striking employees "[e]ven as vacancies became available," because, he claimed, they had all been permanently replaced (Pet. App. A-29 to A-30). Immediately after this session, the Union sent the Company a mailgram terminating the strike. The Company did not offer to reinstate any former strikers until September 1, 1977. Thereafter, the Company gradually made offers of reinstatement to former strikers (11 in September, 5 in October, 9 in November, 2 in December and 1 in January 1978) (Pet. App. A-30 to A-31).

conclusion of the strike, held on September 2, 1977, the Company reinstated its prestrike proposals, including its proposal for a three-year agreement, except that it reduced the proposed annual wage increase of 15 cents first to 10 and then to 12 cents. The Company modified its opposition to union security, stating that it opposed compulsory membership and checkoff only for the first twelve months of the agreement (it subsequently reduced the time to the first six months) (Pet. App. A-23 to A-25). However, the Company insisted that the strike replacements be permanently exempt from a union security clause. Robbins explained that he had given "his word to each one of the people that was hired during the strike and told them that they would never have to belong to a union or pay union dues" (Pet. App. A-24 to A-25).[4] The Union continued to seek union shop and checkoff provisions, effective upon the signing of an agreement, although it was willing to delay for a month the application of those provisions to strike replacements (Pet. App. A-25; A. 135).

Thereafter, the Company adhered to its position on union security, rejecting several suggested compromises from the Union, such as an agency shop clause or a union security clause applicable only to strike replacements hired after July 1, 1977 (Pet. App. A-26; A. 162-164, 263, 280, 537-541). On December 28, 1978, a one-year agreement was finally executed effective from October 1, 1978, to September 30, 1979. It provided that "[t]here will be no compulsory Union membership required of any

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[4]On May 20, 1977, Robbins had informed the strike replacements that he had withdrawn "compulsory membership" and dues checkoff clauses in negotiations and that they had a "complete choice" whether to join the Union and pay dues (Pet. App. A-24). He repeated this unsolicited commitment to all job applicants, even after the end of the strike (Pet. App. A-25).

employees [*sic*] who was hired before October 1, 1978" (Pet. App. A-34 to A-35).

2. The Board, adopting the Administrative Law Judge's findings and conclusions, found that the Company had violated Sections 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by bargaining in bad faith with no intention of reaching an agreement from May 6, 1977, until the end of the strike, and by thereafter continuing to bargain in bad faith over union security (Pet. App. A-4 to A-5, A-41).[5]

The ALJ had rejected the Company's assertions that the "severe tactics" it adopted of withdrawing previously agreed upon proposals and refusing to renew union security and checkoff provisions were required to "induce the Union to reduce its wage demands" (Pet. App. A-21 to A-22, A-32). Rather, the ALJ had found that the Company's position had been motivated by "the hope of first breaking the strike and then ousting the Union [and that] the Company's position on exempting new employees from union-security provisions was taken in bad faith, in furtherance of its union-ousting efforts" (Pet. App. A-34). Thus, the ALJ had noted that "President Robbins admitted that there had been 'excellent movement' in the * * * prestrike negotiation [on non-economic items] and also 'movement' on the part of the Union on April 28 when it reduced its initial wage

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[5]The Board also found that the economic strike was prolonged by the Company's bad faith bargaining and was converted into an unfair labor practice strike on May 6, 1977; that the Company had violated Sections 8(a)(3) and (1), 29 U.S.C. 158(a)(3) and (1), by rejecting the unfair labor practice strikers' unconditional offers to return to work and by delaying offers of reinstatement to them; and that the Company further had violated Sections 8(a)(3) and (1) by discharging three strikers for engaging in protected activity (Pet. App. A-4 to A-5, A-41 to A-42). The court of appeals upheld these findings, and the Company does not challenge them here.

requests by the amount of 54 cents an hour" (Pet. App. A-21). He also had noted that, despite Robbins' testimony that "one purpose of his bargaining tactics was to avoid protracted negotiations" (Pet. App. A-22 to A-23), Robbins admitted that he had not expected the Union to take his May 6 offer seriously (Pet. App. A-33 to A-34) and had refused to budge therefrom throughout the strike despite the Union's flexibility on wages (Pet. App. A-22). Finally, pointing to the Company's unlawful delay in reinstating the strikers, the ALJ had concluded that the Company's post-strike position on union security was a tactic to reduce further "the Union's support and bargaining strength" (Pet. App. A-35).

The Board ordered the Company, *inter alia*, to bargain in good faith with the Union upon its request (Pet. App. A-5, A-43 to A-44). The court of appeals sustained the Board's findings and enforced its order (Pet. App. A-1 to A-2).

ARGUMENT

1. Sections 8(a)(5) and (d) of the Act, 29 U.S.C. 158(a)(5) and (d), require an employer to bargain in "good faith" with the chosen representative of its employees. In determining whether an employer has met that obligation, the Board considers, among other factors, whether the employer's "conduct at the bargaining table evidences a real desire to come into agreement." *NLRB* v. *Insurance Agents' Union*, 361 U.S. 477, 498 (1960); accord, *NLRB* v. *American National Insurance Co.*, 343 U.S. 395, 402 (1952) ("performance of the duty to bargain requires more than a willingness to enter upon a sterile discussion of union-management differences"). See also *NLRB* v. *Truitt Manufacturing Co.*, 351 U.S. 149, 154-155 (1956) (Frankfurter, J., concurring and dissenting). Here, the Board, upheld by the court of appeals, found that the Company failed to bargain in good faith when, after the

commencement of the strike and throughout its duration, it withdrew all of its prior proposals and tentative agreements, including its wage proposal, challenged for the first time the union security clause, and met with the Union with no intention of reaching an agreement.

The Company does not appear to dispute (Pet. 15) the settled proposition that the duty to bargain "contemplates 'a willingness to enter the discussions with an open mind and purpose to reach an agreement consistent with the respective rights of the parties.' " *Dow Chemical Co.*, 216 N.L.R.B. 82, 85 (1975), quoting *NLRB* v. *Texas Coca-Cola Bottling Co.*, 365 F. 2d 321, 322 (5th Cir. 1966). Rather, it contends (Pet. 11-12) that its "hard bargaining posture" was "designed not to frustrate agreement, but to reach agreement." The Board's rejection of this view of the Company's bargaining tactics, upheld by the court of appeals, presents only an evidentiary issue that does not warrant review by this Court. *NLRB* v. *American National Insurance Co.*, 343 U.S. 395, 409-410 (1952); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

2. The Company's further contention (Pet. 12-13, 16) that the Board based its finding of bad faith bargaining on its view of the fairness of the Company's substantive proposals misconstrues the basis of the Board's decision. As shown in the Statement (*supra*, at 2-5, and see Pet. App. A-16 to A-26), the Board's finding of bad faith was not based on the content of the Company's proposals. The Board's finding was based on the Company's tactics of withdrawing previous proposals and tentative agreements, which, coupled with its unlawful delay in reinstating the strikers, its statements to the replacements concerning union security and its post-strike bargaining posture on that issue, demonstrated that it was not

motivated by an intent to reach agreement but by a desire to oust the Union as bargaining representative.[6]

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[6]*H.K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970), is inapposite. There, the Court invalidated a Board order that specifically required the employer to grant the union a checkoff provision even though the employer had not agreed to such a proposal in collective bargaining. The Board's order here does not require the Company to agree to any particular contract provisions; it merely requires the Company to bargain in good faith about terms and conditions of employment (Pet. App. A-63). Moreover, in *American National Insurance Co., supra*, the Court indicated that, while insistence on a management functions clause was not a per se violation of the Act, the Board was not foreclosed from finding, in an appropriate case, that insistence on particular contract terms had been employed as a means of evading the obligation to bargain in good faith (343 U.S. at 409).

The Company's reliance on *Midwest Casting Corp.*, 194 N.L.R.B. 523 (1971), also is misplaced. There, the Board found credible the employer's assertion that it withdrew its entire proposed contract in order to "evoke a more receptive response by the Union to company proposals hitherto rejected * * *" (*id.* at 531). The Board noted that the employer's proposal was reinstated at the next bargaining session, and that the Union had been intransigent in its bargaining posture and unwilling to meet frequently during the day or for long periods at night. *Ibid.* Although the Company asserts that its situation was similar to that presented in *Midwest Casting* (Pet. 7; Pet. App. A-20, A-22), the Board, noting that the Company admitted that "excellent" progress had been made in the prestrike negotiations (Pet. App. A-21), found *Midwest Casting* to be "largely inapposite" (Pet. App. A-32).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1980

DOJ-1980-07